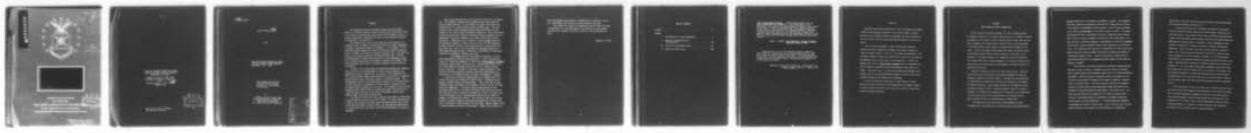
AD-A035 858 AIR FORCE INST OF TECH WRIGHT-PATTERSON AFB OHIO F/G 5/4
AMERICAN DIPLOMACY BEFORE THE COURTS: JUDICIAL REVIEW OF SOVIET--ETC(U)
JAN 77 S M MILLETT

UNCLASSIFIED AFIT-TR-77-1 AU-1-77-AFIT/EN NL

1 OF 2
AD A035858



UNITED STATES AIR FORCE

AIR UNIVERSITY

AIR FORCE INSTITUTE OF TECHNOLOGY

Wright-Patterson Air Force Base, Ohio

AMERICAN DIPLOMACY BEFORE THE COURTS: JUDICIAL REVIEW OF SOVIET-AMERICAN RELATIONS, 1917-1942

Stephen M. Millett, Capt, USAF
Assistant Professor of Humanities
AFIT

77-1
Technical Report - AFIT TR [redacted]
January 1977

A-77
AU-[illegible]-AFIT/ENH

Technical Report 77-1

1977

AMERICAN DIPLOMACY BEFORE THE COURTS: JUDICIAL REVIEW OF SOVIET-AMERICAN RELATIONS, 1917 - 1942

by

STEPHEN M. MILLETT, Capt, USAF
Assistant Professor of Humanities
Department of Humanities
Air Force Institute of Technology

PREFACE

This monograph explores the domestic legal and constitutional aspects of the American policy toward the Soviet Union from 1917 to 1942. It is a study of both American constitutional and diplomatic history, as the two intertwined to determine the tenor of Soviet-American relations from World War I to World War II.

The premise of this study is that American foreign policy is influenced in part by domestic considerations which are almost independent of broader international aspects of diplomacy. In this matter, the private and corporate demands for redress of grievances against the Soviet policy of property confiscations played an important role in the American policy not to recognize the Soviet government before 1933. And when President Roosevelt decided upon the policy of granting de jure recognition in 1933, he was aware of the domestic pressures for a general debt-claim settlement which stood in the way of hopefully cordial relations with Moscow.

Further, this study presumes that American diplomacy has a domestic effect, often not fully appreciated by either the White House or the Department of State. Specifically, the policy of non-recognition from 1917 to 1933 created complex legal questions for the courts in litigations questioning the status of Russian property in the United States. Then the diplomatic contract that made American recognition of the Soviet Union in 1933 conditional, the Roosevelt-Litvinov Accords, created new legal and constitutional problems for the courts. The litigation of the Litvinov Assignment after 1934 provides an interesting insight into the constitutional questions raised as to the effect of diplomatic accords upon domestic legal institutions and doctrines.

This analysis covers four topics concerning the domestic consequences of Soviet-American relations from 1917 to 1942: the legal interpretations of American non-recognition before 1933, the constitutional law of recognition and international judicial comity, the diplomacy and adjudication of international debts and claims, and the constitutionality of executive agreements.

These topics have more than just historical interest for our generation. The diplomatic problems that prevented cordial Soviet-American relations before World War II bear insight into some of the persisting problems that still plague Soviet-American relations today. The court rulings in the Litvinov Assignment cases provide the historical antecedents for the current laws of diplomatic recognition. And, the questions arising from conditional recognition and debt-claims settlements that are implemented by executive agreement rather than treaties have a future application. Undoubtedly, the President will grant de jure recognition of the People's Republic of China, and his action will raise diplomatic and legal questions similar to the recognition of the Soviet Union over forty years ago. There is also the question of de jure recognition of North Korea and North Vietnam, in addition to the question of conditional restoration of diplomatic relations with Cuba.

The backbone of this study appeared originally in my doctoral dissertation at The Ohio State University in 1972, "The Constitutionality of Executive Agreements: An Analysis of United States v. Belmont." The current study differs in several ways. Substantial portions of the first three chapters have been revised and the last chapter has been entirely rewritten. The focus of this study is upon the judicial interpretations of Soviet-American relations, which was subordinated in my dissertation to the broader analysis of executive agreements in general.

I would like to express my appreciation to my readers and critics at Ohio State who first guided this research topic: Professors Marvin Zahniser, Bradley Chapin, and Alfred Eckes. I would also like to thank Professor Michael Les Benedict and my brother, Allan R. Millett, for their advice and suggestions. I also owe a debt of appreciation for the assistance given to me by the staff of the Ohio State University Library, Ohio State Law Library, University of Dayton Law Library, Air Force Institute of Technology Library, the Manuscript Division of the Library of Congress, and the National Archives. The revision of this work was sponsored as a research project of the School of Engineering, Air Force Institute of Technology, Wright-Patterson Air Force Base. Special thanks is due to Associate Dean Lynn Wolaver and Professor I. Webb Surratt of AFIT for

their encouragement and guidance in completing this manuscript, and to Mrs. Joyce Barnes, who patiently typed the numerous revisions.

Even though this project was sponsored by the Air Force Institute of Technology, the views expressed in this manuscript are the author's and they do not represent the official views of the United States Air Force.

Stephen M. Millett

TABLE OF CONTENTS

"This is government by lawsuit....Constitutional lawsuits are the stuff of power politics in America. Such proceedings may for a generation or more deprive an elected Congress of power, or may restore a lost power, or confirm a questioned one. Such proceedings may enlarge or restrict the authority of an elected President....Decrees in litigation write the final word as to distribution of powers as between the Federal Government and the state governments and mark out and apply the limitations and denials of power constitutionally applicable to each...."

Robert H. Jackson, The Struggle for Judicial Supremacy (New York, 1941), p. 287.

"Legal doctrines are not self-generated abstract categories. They do not fall from the sky; nor are they pulled out of it. They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots."

Associate Justice Felix Frankfurter, concurring opinion in Reid v. Covert, 354 U.S. 1 (1957), p. 50.

Abstract

Following the Bolshevik Revolution in 1917, the American government refused to grant de jure recognition to the Soviet regime in Russia. American courts likewise refused to acknowledge the legal existence of the Soviet Union in matters concerning Russian property in the United States.

In the Litvinov Assignment of 1933, when President Roosevelt granted conditional recognition to Moscow, the Soviets assigned its rights to Russian property in the U.S. to the American government. The assignment, however, proved to be difficult for the courts to interpret and implement after sixteen years of non-recognition. In 1937, the Supreme Court ruled in United States v Belmont that the assignment had been an executive agreement with the same domestic legal effect as a treaty. Five years later, it ruled that the American government had a superior claim to the disputed Russian property to that of any private claimants because of the 1933 executive agreement.

A review of the cases concerning the legal effects of Soviet-American relations from 1917 to 1942 demonstrates the domestic impacts of foreign relations and the role of the courts as they influence the conduct of foreign relations.

CHAPTER I

THE DIPLOMACY OF SOVIET RECOGNITION

On the evening of Thursday, November 16, 1933, President Franklin D. Roosevelt hosted his first annual dinner party for his cabinet. Besides the members of his council, he had invited as guest of honor the visiting Soviet Commissar for Foreign Affairs, Maxim Litvinov, and key personnel of the Administration then involved in untangling Soviet-American relations. A few of the guests drifted away after dinner; at eleven o'clock the President excused himself and went upstairs to his study. As he wheeled in, five people greeted him: Commissar Litvinov, Secretary of the Treasury Harry Woodin, Henry Morganthau, the chief of the Farm Credit Administration who would shortly replace Woodin, and Under Secretary of State William Phillips.

Roosevelt presented Litvinov with seven notes to sign. These prepared drafts were the conditions the President demanded for American diplomatic recognition of Soviet Russia. Although the notes summarized the negotiations of eight days, Litvinov still objected to the wording of certain conditions. After further discussion, the Commissar signed the drafts at about 1:40 A.M. Roosevelt joyfully signed five notes in exchange. To celebrate the resolution of sixteen years of misunderstanding, distrust, and political nonintercourse, the President and his guests quaffed the last of the White House's illegal beer.[1]

The signing of these twelve notes, dated November 16, 1933 (although really finalized early the following day) constituted American

de jure recognition of the Communist government in Moscow. The agreements which were negotiated preparatory to the official recognition were collectively known as the Roosevelt-Litvinov Accords. The first note was Roosevelt's official acknowledgment of the Soviet regime in Russia. The second constituted Litvinov's acceptance of political recognition and his government's wish for cordial diplomatic relations with the United States. The next two were a reciprocal agreement on governmental restraint of propaganda and political subversion against the political organization of the other's state. This concession was required by the Department of State as assurance against political contacts between future Soviet diplomats and members of the American Communist Party. Litvinov also wished a promise that the United States would end its propaganda and moral support of White Russian emigres in Europe.[2]

The fifth and sixth notes concerned the religious freedom accorded American citizens in Russia, a concession of great concern to numerous public opinion groups who had opposed recognition of the atheistic Communist government. The next two were a reciprocal promise to protect the civil liberties of each other's nationals and a pledge to negotiate a consular treaty in the near future. The ninth note was a definition of economic spying by Litvinov which the State Department hoped would avoid future problems for inquisitive American businessmen in the Soviet Union. The tenth note was the Soviet assignment of all claims to property that it claimed in the United States as a preparatory settlement of American claims against the Soviet government. In the following note, Roosevelt acknowledged the receipt of these claims. And in the last note, Litvinov waived the Soviet claim against the United States for the American

expeditionary force that had occupied parts of Siberia during the Russian Civil War some fourteen years earlier.[3]

If these notes were really intended to liquidate the ideological conflict between the Soviet Union and the United States, they were an unqualified failure. The problems raised later by different interpretations of what the wording meant created almost as much tension between Moscow and Washington as they were meant to eliminate. Soviet propaganda via the Communist International in Moscow continued to influence the American Communists. Soviet officials continued to harass American citizens in Russia. For a while American Ambassador William Bullitt could not even find a permanent site for his embassy in Moscow. But for the Roosevelt Administration, the greatest aggravation probably concerned the Soviet debt issue. There had been a secret note, signed by Roosevelt and Litvinov on November 15. In it they made a "gentleman's agreement" that Moscow would pay between $75 million and $150 million on the debts of the Imperial and Provisional Governments to the American Government and private citizens.[4] The whole point of the last three notes was to eliminate certain claims so that the exact amount that Moscow would pay Washington could be negotiated swiftly.

Since the accords of over forty years ago, the Soviet Union has never paid any of those claims based on the obligations of former Russian regimes. Of all the notes exchanged on November 16, only the tenth note, known as the Litvinov Assignment, gave the United States any satisfaction in the realization of its claims. And it was the Department of Justice, acting through nine years of litigations in American courts, that recovered over $8.5 million of Soviet funds in the United States.

American Policy of Non-Recognition

Before recounting the legal battle that issued from the government's litigation of claims by the Litvinov Assignment, it is necessary to review briefly Soviet-American relations from 1917 to 1933 in order to understand the nature of the problems that the 1933 accords sought to solve.

It was an established principle of foreign policy in the Wilson Administration before 1917 that governments born of revolution should not be recognized immediately. Woodrow Wilson was a political scientist who believed that world order must be based on the rights and obligations sacred to Anglo-American institutional values. As President, he refused to grant diplomatic recognition to any revolutionary government until it had been legitimized by its own people. The State Department on March 12, 1913, had circulated a "Declaration of Policy with Regard to Latin America," which had stated that "Cooperation is possible only when supported at every turn by the orderly process of just government based on law, not upon arbitrary or irregular force."[5] The legalistic standards for diplomatic intercourse created numerous problems for the administration in its relations with Mexico. Yet this policy toward Latin America, which had already clearly revealed complications for American military and business interests, was basically the same approach Wilson took toward Communist Russia. Wilson, however, had made an exception for the first Russian Revolution. When the workers of Petrograd had overthrown the Tsarist government early in 1917, Wilson departed from his recognition policy and granted almost immediate recognition, even though there was not only no constitution but also no firmly established government. In this case, only one month before American entry into World War I, Wilson accepted an abstract notion of legitimacy

based more on diplomatic expediency than anything else. The fall of the Provisional government eight months later showed how wrong the United States was in its expectations for its successful execution of the war and fulfillment of Russian domestic needs.[6]

Washington's first reaction to V. I. Lenin's Soviet government was doubt as to whether it would survive. This was an uncertainty which Lenin himself felt. It was not until 1921, after the bloody civil war between Whites and Reds, that the Bolsheviks gained firm control of Russian political affairs. Wilson himself was ambivalent about the Soviets: he despised their Marxist values and their violent abrogation of individual freedoms, but he opposed either a restoration of the monarchy or political chaos in Russia. Meanwhile, he feared Japanese exploitation of Russian politicial disorder to penetrate into Siberia. His primary reason for allowing an American expeditionary force to Siberia in 1919 was to frustrate the Japanese in any attempt to annex the Maritime Provinces.

Secretary of State Robert Lansing, on the other hand, had a marked hostility to the Bolsheviks. He viewed them as traitors to the Allied war effort against Germany and as revolutionaries who were attempting to subvert world stability. After Wilson's crippling stroke in mid-1919, foreign affairs were guided by his new Secretary of State, Bainbridge Colby. He refused to consider recognition of the Soviet Union, because he was unconvinced that its leaders were the legitimate representatives of the Russian people. Further, as a matter of national interest, he asserted that the United States would refuse to deal with a regime that confiscated foreign as well as Russian property and abrogated the enormous foreign debts of the Tsarist and Provisional Governments. Colby also feared that American recognition would somehow imply approval of the revolutionary socialist

doctrines of the Communists.[7]

The Republican administrations of the 1920's continued Wilson's policy toward Soviet Russia. Moscow, however, believed that the business-oriented Republicans would be anxious to accord recognition in order to stimulate Russian-American trade. On March 22, 1921, Soviet President Mikhail Kalinin sent a diplomatic feeler to Washington through the Soviet representative in Estonia. It is not known exactly what President Warren G. Harding personally thought about the Russian situation, but he certainly would not do anything independently of his cabinet and political advisors. Harding presented Kalinin's message at a cabinet meeting on March 25. No one supported diplomatic recognition at that time. Two secretaries were adamantly against it: Secretary of Commerce Herbert Hoover and Secretary of State Charles Evans Hughes. They argued that American recognition would strengthen the weak Bolshevik dictatorship and Moscow would use diplomatic personnel for political subversion in the United States. They further stipulated that recognition must be preceded by Soviet guarantees for civil liberties of American citizens in Russia and a commitment to settle the debt question.[8]

Hoover compared Russia to a "bad neighbor." He said that if you left him alone, hopefully he would leave you alone; at least, you would not invite him into your home.[9] He was convinced that trade would not be realized with Soviet Russia until the Russians resumed industrial production. In Hoover's mind industrial productivity and communism were antithetical, since capitalism was the only system industrialization had ever known.[10] With Hoover's and Hughes' insistence, Harding included in his reply message to Kalinin that "Production is conditional upon the safety

of life, the recognition by firm guarantees of private property, the sanctity of contract, and the rights of free labor." [11]

Charles Evans Hughes dominated American foreign policy in the early 1920's. He had had a distinguished public career that had won him much public esteem and independent political influence. He had been a Progressive Republican Governor of New York (1906-1910), an Associate Justice of the Supreme Court (1912-1916), and the Republican candidate for President in 1916. As Secretary of State from 1921 to 1925, Hughes was one of the most influential men in the cabinet. In matters of foreign policy, it was his opinions that consistently prevailed. A man who played many roles in American public life, Hughes was first of all a lawyer, and as Secretary of State he saw himself as "Advocate for the United States." [12]

Hughes viewed the Soviet problem in the same context of legalistic and moral standards as had Wilson, Lansing, and Colby. He, too, identified American national interests with established principles of international law. One of his strongest policy statements was a paper he wrote on the centenary of the Monroe Doctrine in 1923. The basis of this doctrine, he explained, was the need to preserve American security, peace, and prestige through independence of action. As for Europe, Hughes paraphrased the dictum of Thomas Jefferson: "Peace, commerce, and honest friendship with all nations, entangling alliances with none." He asserted that the United States had fought in the World War to protect liberty from autocratic power, and now that the war was won, the United States would not lose its freedom of action by committing itself to the different priority of interests that Europe had from America. In the relationship of nations, Hughes continued in a legalistic view, there are obligations and responsibilities. "Among

these obligations is the duty of each State to respect the rights of citizens of other States.... A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property validly possessed under the laws existing at the time of its acquisition that the conduct of activities in helpful cooperation are possible." [13] These remarks were aimed as much at Soviet Russia as at the Latin American republics.

Hughes refused to recognize the Soviet government for three principal reasons. First, communism as a social and economic experiment was, in Hughes' eyes, both ruinous to Russia and dangerously subversive to a world order based on capitalistic economy and Anglo-American common law doctrines of international law. Secondly, Hughes feared that American recognition of Russia also might expose this nation to Communist propaganda and political subversion. Thirdly, Hughes feared that political recognition would validate Soviet confiscation of American assets in Russia and acquiesce to the Soviet abrogation of the public debt to the United States, acquired during 1917 to carry on the war against the Kaiser. The Secretary readily admitted in public that the United States acknowledged the deffecto existence of the Soviet Government in Russia. But in order to have relations with the United States, Hughes insisted that the Kremlin had to fulfill two criteria prior to recognition: prove its internal political stability, and acknowledge its international debts and obligations. [14]

Even though there was considerable pressure on Harding by some businessmen eager to exploit Russia's untapped wealth, the President adhered to Hughes' non-recognition policy. In his last prepared speech, which he never gave due to his sudden death on August 2, 1923, Harding had written

that "political recognition prior to correcting fundamental error tends only to perpetuate the ills from which the Russian people are suffering. International good faith forbids any sort of sanction of the Bolshevik policy.... The whole fabric of international commerce and righteous international relationship will fail if any great nation like ours shall abandon the underlying principles relating to sanctity of contract and the honor involved in respected rights." [15]

The Soviets sent another feeler to Washington in December 1923 in the hopes that President Calvin Coolidge would reconsider Harding's foreign policy. Even though the administration scandals had shaken up the cabinet, Hughes, uninvolved in the corruption in the Justice Department and Interior Department, remained Secretary of State and continued to dominate foreign relations. Hughes wrote a response to the Soviet inquiry through the American consul in Reval, Estonia. He insisted that the Soviet Union would have to make three unilateral concessions before the United States would grant diplomatic recognition: either restore the confiscated property of American citizens or make just compensation, repeal the decrees of 1917 that repudiated Russian obligations to the American government, and end all subversive propaganda in the United States. [16]

The policy of non-recognition based on political distaste was not a new one for the Department of State. Since the Administration of George Washington, the United States had always had two basic criteria for <u>de jure</u> recognition of a new state or government: present and future political stability, and willingness to honor international obligations. The changes in recognition policy from time to time were only one of emphasis, not substance. Whether the stress was on stability or fulfillment of commitments was determined

by the American national interest at the time and in the particular situation.[17]

The concept of diplomatic recognition itself originated in the courts of Europe where one monarch judged the legitimacy of another's claim to a throne. Before the era of republicanism, recognition prompted questions of family and divine right. Naturally, the newly established republic on the western shore of the Atlantic did not accept this criterion for its standard of international intercourse. As Secretary of State, Thomas Jefferson helped to establish the policy that the United States would recognize any de facto government. This policy arose in response to the radical regimes in Paris that emerged from the chaos of social revolution. Jefferson was generally sympathetic to French republicanism in principle, and he fully realized that ideologically it would be beneficial to American interests to have an anti-monarchical ally in Europe. The one prerequisite Jefferson demanded of a new government was that it have popular support, or it could not be truly republican. In a letter to the American minister in Paris, he wrote: "It accords with our principles to acknolege [sic] any government to be rightful which is formed by the will of the nation substantially declared. The late government was of this kind, & was accordingly acknoleged by all the branches of ours. So any alteration of it which shall be made by the will of the nation substantially declared, will doubtless be acknoleged in like manner."[18]

The State Department could not concede recognition based only on de facto existence in the secession crisis of the Civil War. Secretary of State William Seward demanded that any new government should first show its political stability by a constitutional acclaim of the broadest number of people. This was not necessarily a more legalistic approach, but certainly a more demanding criterion for legitimacy in order to prevent foreign

recognition of the Confederate States of America. "The policy of the United States," Seward wrote to the American minister to Peru in 1866, "is settled upon the principle that revolutions in republican states ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanency. This is the result of reflection upon national trials of our own." [19]

It was in the latter part of the nineteenth century that the State Department stressed that a new government had to acknowledge the obligations of international law before American recognition. This requirement was based upon two concepts of national interest. The United States was becoming a major world power, proving the American republican experiment a striking success. The State Department officials, many of them lawyers by training, projected American values upon foreign societies. Since international law was the product of Western culture, it was in the American interest to demand that new governments adhere to the values which affirmed a world order based on values which were in harmony with those of American society. Further, international law protected individual rights, the sanctity of private property, and urged the solemn duty to honor public debts. The State Department, of course, would not as a rule recognize any government that abrogated its debts or infringed on American foreign business interests, which by 1900 had become very considerable indeed. William Howard Taft, the President with a judicial temperament, expanded on Seward's recognition standards, as Seward had elaborated on Jefferson's. During Taft's administration, a great emphasis was placed on ascertaining the legitimacy of new governments as judged by Anglo-American standards of law. [20]

Woodrow Wilson's recognition policy was not therefore a drastic change

from that of his predecessors. Wilson was less business-oriented than Taft, but more moralistic in his concern for governmental structures and methods of rule. He used the policy of non-recognition as a political tool against foreign regimes of which he disapproved. The test of his policy was Mexico, an imbroglio that frustrated him for four years. Fully aware of the political potency of the recognition tool, Wilson was quick to accept the Provisional Government of Russia, because he believed that it would be easier ideologically to deal with it in the war effort than the Tsarist autocracy. As soon as the new Petrograd government agreed to honor the obligations of the Imperial State, it received official American sanction and financial support.[21]

In the final analysis, the legalism of American diplomacy in the 1920's was in the national interest as policy-makers understood it at the time. The American government had gone deeply in debt to its own people in order to finance World War I. If the former allies did not repay their loans to America, the repayment of American war bonds would have to come from the taxpayers. Since taxation is a very unpopular way to finance government, the Republican administrations insisted that England and France pay their debts. In turn, the Allies could not pay their obligations unless Germany paid reparations, or Bolshevik Russia agreed to pay the enormous debts of the Tsarist government. Lenin had solved financial disaster in Russia very expeditiously: he abrogated all foreign debts, and nationalized private property above a certain size (so as not to alienate his domestic political allies, the poor peasants). If the United States had given diplomatic recognition to Soviet Russia, it would have validated in the eyes of American law all acts of the Communist government since its creation. This would have jeopardized American interests in Latin America and damaged American

moral suasion (the substitute for physical force) on Europe, besides forsaking claims against Russia itself.

There was, however, a national interest greater than the debt issue which was Hughes' top priority. That was world stability which assured the peace that would be so conducive to American prosperity at home and the expansion of markets overseas. If he did not like the Communists and the socialist experiment, Hughes did not want political disintegration of the huge Eurasian state. At the Washington Conference in 1921, he played the role of "Protector of Russia--Foe of Leninism." He put pressure on the Japanese to withdraw from Siberia and to accept the Pacific status quo of 1919. He also supported the American famine relief mission to Russia, a project headed by Herbert Hoover. On August 19, 1921, the United States signed an agreement with the Soviet government (an act of de facto recognition) for 200 American agents to distribute $66 million worth of goods directly to the Russian people. Hughes saw this mission as good political propaganda and an opportunity to find out more about Communist society. Hoover hoped that it might facilitate American economic penetration of Russia. In any event, Hoover realized that food relief was good business for depressed American farmers.[22]

After the election of Calvin Coolidge to the Presidency in his own right in 1924, Hughes turned the State Department over to his good friend, Frank Kellogg. Kellogg frequently sought Hughes' advice, and continued the Russian policy formulated in 1921. By this time, non-recognition had lost its political value because Soviet Russia had won the recognition of the major European powers. With diplomatic intercourse in Europe, Moscow acquired credits, loans, and trade. Yet Kellogg refused to change American

policy as long as nothing was to be gained for the United States by it. [23]

Herbert Hoover was elected President in 1928, and he brought to the White House the same attitudes he had held as Secretary of Commerce (1921-1928). He was adamantly against dealing with the godless, private property-destroying Communists. Before 1929, the United States could afford to be demanding in its diplomatic relations with the Soviet Union. It did not have to bow to the economic pressures and social unrest that made London and Paris more amenable to economic relations with Russia. This state of affairs ended with the stock market crash in the autumn of 1929. Now trade became very important to the general economic scene, and some believed that Washington could no longer afford diplomatic luxuries. New pressures from businessmen were put on the White House to recognize Soviet Russia in the hope of stimulating profitable trade. Hoover would not yield. He conducted foreign affairs with the same lofty principles with which he handled domestic problems.

Military concerns compounded the Soviet recognition dilemma for Washington. In 1931 Japan invaded Manchuria, and converted it into a Japanese puppet state called Manchukuo. More than economic matters, this act of aggression deeply affected Secretary of State Henry L. Stimson. To Stimson, the crisis came at a bad time for the United States to deal properly with it. He and Hoover grew further apart as the President refused to divert either his attention or national resources away from domestic problems. Stimson's dilemma was to raise enough objection to the Manchurian crisis to show the world that the United States continued to defend peace and world order, yet not protest enough to alienate Japanese diplomats or embarrass the civilian government in Tokyo in its apparent internal power struggle with the military.

Discussion and conciliation failed to deter the Japanese encroachments upon China. Stimson favored a more forceful American policy, but Hoover refused to consider any economic sanctions against Japan. A naval show of power was absolutely out of the question. So Hoover relied on the cheapest weapon he had: moral suasion and public opinion against Japan. When Japanese troops attacked Shanghai, Stimson was near despair. [24]

Hoover's policy was non-recognition of the new state of Manchukuo, a feeble denial of a fact that had been made true by bayonets. Stimson was sure that this approach would be no deterrent to future Japanese actions. It was during this crisis in Asia that the Secretary began to realize the diplomatic importance of the Soviet Union, the only power in Asia that could check Japanese expansion. In Geneva during the spring of 1932, Stimson met Karl Radek, an important figure in the Communist Politburo. He told Radek that no matter how desirable Soviet-American relations might be American public opinion would not support the recognition of the Soviet Union unless Moscow made some ideological concessions to the United States. [25]

Officially, however, Stimson continued the old policy vis-a-vis the Kremlin. In a letter to Senator William E. Borah on September 8, 1932, he explained that the American policy in Asia was based on the defense of the integrity of international obligations, the "good faith and sacredness of keeping international promises," and mobilizing world public opinion against the Japanese. To recognize Soviet Russia at this time, he argued, would be to weaken American moral suasion on Tokyo.[26] Perhaps Stimson was caught in the dilemma of legalism versus world power politics. Or maybe as Secretary of State he had to adhere to policies that he personally disapproved. But behind the scenes, he was working hard to change Hoover's generally pacifist

policy. On January 9, 1933, with the greatest reluctance on Hoover's part, Stimson met with President-elect Roosevelt at Hyde Park. They discussed the Asian situation, among other things, for six hours. They met again in Washington ten days later. Stimson felt reassured that Roosevelt and his Secretary of State, Cordell Hull, would take a stronger stand toward Japan than had Hoover. Under FDR, Stimson felt that both the fleet build-up and the recognition of the Soviet Union were the realization of his own foreign policy.[27]

The Negotiations of Recognition

The Roosevelt-Litvinov Accords were the culmination of nine months of secret negotiations through various unofficial channels. One of the renewed Soviet feelers for recognition came at Tokyo in February 1933. The Soviet Military Attache told his American counterpart that there was a need for friendly Soviet-American relations in the face of the Japanese threat to Russia's far-eastern provinces and American interests in China. He said that while the Kremlin still refused to pay the American claims against it, it would be willing "to arrange something that would be the equivalent of paying the debts."[28] Five months later, William C. Bullitt, FDR's personal advisor on Russian affairs, met twice with Maxim Litvinov, the Soviet Commissar for Foreign Affairs, in London during the Economic Conference. The Commissar agreed that he would accept an anti-propaganda condition for American recognition as long as it was a bilateral agreement. Litvinov also gave Bullitt the impression that Moscow could spend $50 million a year in gold for American goods if normal diplomatic intercourse were established.[29]

From his first day in office, Secretary of State Hull received delegations and petitions both for and against recognition of Moscow. Religious,

labor, and patriotic associations were still against any detente with the Communists. Business leaders and political liberals strongly advocated recognition for their own variety of interests. Hull, too, and another Presidential advisor, Columbia professor Raymond Moley, met with Litvinov in London. In September, Hull made his offical recommendation to Roosevelt to grant diplomatic recognition to the Soviets, but with some conditions which the Kremlin had to accept as a quid pro quo for recognition. [30]

Roosevelt himself probably favored recognition from the beginning of his administration. His problem was how to do it in a way that would win genuine Soviet friendship without alienating American public opinion, particularly the anti-Russian lobbies on Capitol Hill. For a while, he let the State Department handle the issue, even though he did not fully trust the judgment of striped-pants diplomats and career bureaucrats. Then as he began to grow impatient, FDR used his own personnel to explore private channels. In August Henry Morganthau of the Farm Credit Administration informed the President that Amtorg, the American chartered Soviet trading organization in New York, wanted to buy $75 million of raw materials. To increase business and farm pressure for recognition, FDR held up the Reconstruction Finance Corporation negotiations with Amtorg on a cotton deal. He told Morganthau to put a $100 million ceiling on American sales to Russia, half machinery and half raw materials, with a 15% to 20% down payment. [31]

Meanwhile, the State Department tried to caution the White House on the risks involved in dealing with the Soviets. The Chief of the Division of East European Affairs, Robert F. Kelley, outlined for FDR the technical problems of recognizing the Soviet Union after sixteen years.

He warned that recognition by itself would not mean friendly relations and trade unless three major points of conflict were eliminated beforehand. These were Moscow's relationship to Communist Party activities in the United States, the Soviet repudiation of debts and the confiscation of American property, and the almost irreconcilable differences between the two economic and social structures. Kelley listed exactly what the Soviet debt was to the United States: $192 million to the American government owed by the Provisional Government, $86 million worth of Tsarist and Provisional Government obligations to American citizens, and $336 million worth of American-owned property confiscated by the Bolsheviks in 1918. He further observed that it was in the national interest to make the Kremlin acknowledge these obligations in order to protect American interests abroad and to eliminate a barrier to trade. These debts, Kelley advised, should be settled before recognition, since neither London nor Paris had been able to make the Soviets pay after Moscow had won recognition from them. Finally, he pointed out the legal complications that would arise concerning Russian property rights in the United States that had remained untouched by the State Department because of non-recognition of the Soviet government.[32]

On October 5, Hull forwarded to the President two further memoranda on the subject. Assistant Secretary of State Walton Moore made several observations. He personally approved of recognition without delay, provided that Moscow made a promise not to interfere in internal American affairs. He then pointed out that after the Soviets gained recognition, which they dearly wanted, they would be much more difficult to deal with. Therefore, Moore recommended that there be a comprehensive agreement be

between the United States and the Soviet Union before the President granted official recognition that could be formalized in a treaty later. The topics of such an agreement would be Communist subversion, rights of American citizens in Russia, claims of American citizens for Russian bonds and property damages, and the Soviet counter-claims against the United States. Unconditional recognition, he warned, would be of no advantage to the United States and would only arouse hostile American public opinion. Moore also observed that legally recognition of Moscow was not revocable and was retroactive to 1917 unless otherwise stated. [33]

The second memorandum was by Bullitt, whose official title was Special Assistant to the Secretary of State. Bullitt agreed with Moore's conclusions. He warned that before recognition the Soviets would be willing to negotiate; but after they got what they wanted, they would make few concessions. So he recommended that "formal recognition should not be accorded except as the final act of an agreement covering a number of questions in dispute." These questions were the same as Moore's topics, with the added suggestion that the recognition take effect only from the date of proclamation and not be retroactive. [34]

Roosevelt decided to send a feeler to Soviet President Kalinin through Boris E. Skvirsky of Amtorg. Bullitt talked with Skvirsky while he was negotiating trade loans with Morganthau. Bullitt showed Skvirsky the proposed draft of a letter from Roosevelt to Kalinin and asked him whether the Kremlin would accept FDR's invitation to send a representative to Washington to discuss recognition. A few days later Skvirsky showed Bullitt a proposed response to Roosevelt's letter, and asked whether it would be acceptable to the American President. Bullitt said

it would, and he then pulled out the official letter from FDR. Skvirsky immediately pulled out the official response from Kalinin. The man who would come to Washington would be none other than Litvinov himself.[35]

Two days before Litvinov's arrival in Washington, FDR met with Hull, Bullitt, Morganthau, and Under-Secretary of State William Phillips to outline negotiations with the Soviet Commissar. They agreed that the two most important issues were propaganda and freedom of religion for Americans in Russia. Hull personally met Litvinov at the railroad station on November 6. From the beginning the Commissar was uncooperative. He said he had expected American recognition first, with negotiations to follow. Hull assured him that without prior agreements there would be none. Then Litvinov rejected the State Department's prepared draft on domestic non-interference. He also opposed Hull's insistence on a religious guarantee. By November 9, Bullitt and Phillips felt that the only way to save the talks was to shift them to the White House.[36]

Roosevelt and Litvinov had gotten along well at a luncheon at the White House on November 8. Speaking fluent English, the Commissar chatted pleasantly with the President. Showing that he knew his adversaries better than they knew him, Litvinov produced some booklets of new Russian stamps to give to the philatelist President. On November 10 and 12, Roosevelt met with Litvinov again. The Hyde Park squire turned on his famous charm, apparently believing that he could break the Commissar down by laughing and smiling. Gradually, Litvinov relented on some issues, as long as any agreements reached were reciprocal. Roosevelt presented the final drafts of the accords to him in his study after the annual cabinet dinner, and Litvinov signed reluctantly.[37]

The Accords were the results of hard bargaining, and the State Department did not get all that it had wanted. It had strongly urged the President to settle the debt question before recognition. To have a fixed sum, however, would have taken too long to be worth FDR's valuable personal supervision, so the White House was satisfied with the "gentlemen's agreement" to place the figure between $75 million and $150 million. Roosevelt was confident that Moscow would pay the latter sum. Litvinov had agreed to drop the Soviet claim against the United States for its military expedition in Siberia during the Russian civil war after Hull and Phillips produced files to show him that the American intent was directed against Japan, not the Soviets. In addition, Litvinov had assigned various Soviet claims to assets and bank accounts in the United States to the American Government. Exactly what was included in this assignment no one was sure, or even cared to define outside of one specific asset named (the American debt to the Russian Volunteer Fleet for the confiscation of some ships in World War I). All in all, both Roosevelt and Litvinov appeared satisfied with the results of their bargaining.[38] Neither Roosevelt nor Litvinov had wanted prolonged negotiations in the autumn of 1933. The whole point of the conversations was to emphasize the friendliness and common interests between the United States and the Soviet Union, not their differences. When FDR touched upon a subject which Litvinov refused to concede, he backed off. The purpose of the Accords was to be broad enough to solve only the most fundamental conflicts and leave the details for future handling. Friendship was the key word, and neither FDR nor the Commissar wanted to make their deep-seated differences of opinion known to the public.

Roosevelt wanted to recognize the Soviet Union for American political benefits. Roosevelt's top priorities, like those of his predecessor, were domestic economic recovery and world peace. Roosevelt's dilemma was that he could not have both a vigorous domestic program and an active foreign policy. At heart, FDR was a Wilsonian who believed in collective security. But in foreign affairs, he could go no further than public opinion carried him without risking wavering support for certain New Deal programs. Much of his support for the New Deal came from men who were isolationist in their views of international relations; FDR had to respect their sensitivites in order to win their approval for his domestic reform program. For example, early in his administration, Roosevelt told British Prime Minister Ramsay MacDonald and French Premier Edouard Herriot that he supported taking coordinated measures against any agreed-upon aggressor nation. He sent a bill to the Senate that would put an embargo on American-made arms to any nation declared to be an aggessor by the President. Senator Hiram Johnson had the bill amended so as to put an embargo on all belligerents, which would defeat the purpose of the bill as a tool of collective security. Rather than allow a bitter debate on foreign policy while New Deal bills were pending, FDR abandoned his idea. [39]

Yet, Roosevelt was deeply concerned about the international situation in 1933. Adolf Hitler had come to power in Germany on the promise to restore German power and destroy the peace of Versailles. Japanese troops were defeating Chinese forces on the Asian mainland. World trade languished as people all over the world felt the pains of economic

depression. In this atmosphere of unrest and despair, Roosevelt looked for cheap ways for the United States to influence events without becoming directly involved. Diplomatic rapproachement with Soviet Russia was such a move. Through friendly relations with the Kremlin, FDR hoped to promote profitable trade for American manufacturers and farmers and caution both Berlin and Tokyo against rash adventurism.

Even without recognition, the Soviet Union had been carrying on some trade with American firms since 1920. In 1924 Moscow opened a branch of its London-based commercial company, Arcos, in New York City. The same year Amtorg, a dummy stock company owned by the Soviet government, began business in the United States. By 1925 the United States was the primary exporter of goods to Russia, and remained so until Soviet trade relations improved with Germany. During the 1920's, American firms sold five times as much goods to Russia as they bought. In 1930, the peak year for Soviet-American trade, the United States exported $114.4 million to the Soviet Union and imported only $24.4 million worth of goods. By 1932 the import-export figures had dropped drastically to $12.5 million and $9.1 million, respectively.[40]

Many American businessmen hoped to restore, even expand, the lucrative Russian trade when Washington recognized the Soviet government, which controlled all Russian trade as well as industry and agriculture. Department of State officials warned inquiring businessmen that recognition might have little or no effect on trade, because trade flow ultimately rested upon credits, sanctity of contracts, and commitment to past and

future obligations.[41] Indeed, the fall in Soviet-American trade was not due to Soviet diplomatic pressure, but to the effects of the first Five Year Plan, when Moscow could not afford to pay for large amounts of imports unless it could get generous credits abroad. All Soviet imports fell from $560 million in 1931 to $179 million two years later. Yet, in this period the fact remained that 89.7% of all Soviet imports were capital goods and the United States was in a depression partly because industry had over-produced many of the kinds of materials that Russia so desperately needed.[42]

Restoration of trade was an important reason for Roosevelt's recognition of Soviet Russia, especially in terms of building favorable public opinion and the gratitude of otherwise politically hostile businessmen, but it was not the most important one in FDR's mind. He hoped that the attitudes created during recognition negotiations would lead to friendly relations and eventual diplomatic cooperation, particularly in Asia. This is why Roosevelt did not want to seem obstinate in front of Litvinov or insistent on ironclad agreements. If good relations could be established by friendship, then Moscow would adhere to the implicit meaning of any vaguely written accord. The purpose, however, for the accords was more cosmetic than substantive. It was to suggest the possible threat of Soviet-American cooperation against Japan in Asia. But FDR refused to commit the United States to any action that would lose the support of the isolationists on Capitol Hill. In June, he diverted $238 million from the National Recovery Administration for naval armaments, but he flatly refused Litvinov's proposal of an American-Soviet-Japanese or American-Soviet-Chinese non-aggression pact. The best he could hope for was that American recognition of Soviet Russia would give it a moral

boost so that it could deal more effectively with Japan by itself. Therefore, the President had little concern for the precise wording of the Roosevelt-Litvinov Accords as long as they appeared to be a solution to outstanding problems in the eyes of the American public and had the desired effect on Tokyo.[43]

The Soviet Perspective

To understand more fully the meaning and the significance of the Roosevelt-Litvinov Accords, it is necessary to review briefly Soviet economic and foreign policy. The First World War destroyed Russian political order more thoroughly than any other nation involved in it. When the people of Petrograd overthrew the autocracy in March 1917, the Tsar and the centuries-old aristocracy were totally discredited in the eyes of the oppressed Russian people. The Provisional Government that replaced the Romanov Dynasty was aptly named, for it was temporary in every sense. Unprepared to assume power and lacking any constitutional authority, it had difficulty even maintaining order in its own capital. Military defeat was as bitter under republican rule as Tsarist, and hunger had no politics. When Alexander Kerensky failed to provide effective leadership in coping with social disintegration, Lenin's Bolsheviks seized power in the name of the Soviets, the organizations of workers, soldiers, and peasants that had exercised co-authority with the Provisional Government.

The Russia of 1917 was a bankrupt, defeated, humiliated, disorganized, and nearly dismembered state. Its foreign debt was enormous. From 1895 to 1914, the Russian foreign debt had grown from 1,733,000,000 to 4,229,000,000 rubles. Most of this was in the form of state and private loans for rapid industrialization. Then came the great European war in 1914. Russia's allies heavily subsidized the Russian war effort so that seven million Russians would die rather than Englishmen or Frenchmen.

Russia's foreign debt jumped from four billion rubles in 1914 to over thirteen billion by 1917.[44]

Lenin acted swiftly to ease the financial chaos. In December, 1917, the Bolshevik-dominated Soviets nationalized all banking houses in the country. Troops emptied vaults, taking all bank assets and private valuables. The following January 28, 1918, the Soviets repudiated the entire Russian public debt. All foreign loans were unconditionally annulled. The countries most seriously damaged by this were Great Britain and France. London had supplied Russia over five billion rubles during the war, and Englishmen held 22.6% of the private foreign investments in Russia. Paris had contributed nearly a billion and a half rubles to the war effort, and Frenchmen owned 32.6% (732 million rubles) of the private debt. This was of little importance to Lenin. The building of the socialist order did not include capitalist and imperialist obligations, especially ones that he had not made.[45]

After banking, the next major section of the economy that the Soviets nationalized was foreign trade. The economic crisis, however, grew worse in 1918 because of the harsh terms of the Treaty of Brest-Litovsk with the Central Powers and domestic disorder. On June 28, 1918, the Soviets nationalized all industries that had a capitalization of over one million rubles. This did not mean that the government directly confiscated the property of the managers. That had already happened shortly after the October Revolution when workers took over their plants and farmers seized the fields. Few labor councils, however, were as organized and as efficient as the Petrograd metal workers, the vanguard of the Russian workers, and many simply looted their factories. Chaos was intolerable to Lenin, who wanted a disciplined social order to carry out the promises of

Marxist communism. At first, the Soviet nationalizations were considered punitive against capitalists who would not cooperate with the new regime. By June, however, the nature of confiscation changed to "a system of planned nationalization." So complete freedom for the proletariat lasted only six months; workers subjected to the injustices of bourgeois managers now became the workers for oppressive commisars. [46]

Interestingly enough, American-owned property in Russia was not legally nationalized early in 1918. Moscow hoped that American factories would continue to produce goods as before. The effect was all the same: American firms were frightened and their personnel refused to cooperate with the Soviets, so the government eventually took control of all American interests. Singer Manufacturing lost over $38 million; International Harvester, nearly $41 million; and Vacuum Oil Co., over $1.5 million. Much of the over $100 million worth of American industrial property lost was through the ownership of confiscated Russian subsidiaries. The largest category of American property lost, however, was in banking assets. The Soviet government confiscated $209,825,348.82 worth of deposits belonging to American bank branches in Russia. The largest losses were claimed by National City Bank for $180 million and Guaranty Trust for $1.7 million. New York Life Insurance claimed a loss of $67 million and the Equitable Life Assurance Society, $10,000. All totalled, the American claim against the Soviet Union for sequestered property of damages amounted to a principle of $336,691,771.03. [47]

Besides the private debt, the American government had a claim of $187 million for war loans to the Kerensky Government. Of this, $125 million was transferred to the Russian Ministry of Finance in Petrograd,

and $62 million was spent in the United States under the supervision of Boris Bakhmetyev, the Provisional Government's Ambassador to America, and his Financial Attache, Serge Ughet. When the Kerensky regime fell in October of 1917, Washington demanded that the Soviets honor this debt, just as the United States demanded repayment of war loans from her other allies. The Soviets refused to honor this debt for two reasons. First, as a matter of principle, Lenin refused to pay for the imperialistic war that he had so bitterly opposed. Also, if he had recognized the American debt, he would have had to concede the debt to Great Britain and France, which was considerably greater than the American. Secondly, Bakhmetyev and Ughet politically were White Russians, and there was evidence that they had used the American loans to aid White armies in Russia during the civil war. Lenin, of course, would not repay the United States for goods that went to his enemies in the field.[48]

The war loans, confiscation of American private property, the Communist hostility to capitalism were the major reasons why the United States refused to recognize the Soviet Union. In 1919, only the Central Powers, who had forced the militarily defeated Soviets to sign a humiliating peace as the price of leaving the war, had recognized the Moscow regime. From 1920 to 1921 a series of Russia's neighbors recognized the Soviets as a matter of diplomatic necessity, but the major powers refused to do so. On March 16, 1923, however, British Prime Minister Ramsay MacDonald reached an agreement with the Kremlin that connected the debt settlement with a trade arrangement. This constituted de facto recognition, followed by de jure recognition on February 1, 1924. That same year, Moscow was diplomatically acknowledged by France, Canada, Italy, Norway, Denmark,

Czechoslavakia, Sweden, Greece, China, Arabian Saudian Kingdom, and Mexico. Trade was the avenue to diplomacy, and many countries recovering from the economic shocks of the world war could not afford to ignore Russian trade, no matter the color of Bolshevik politics. [49]

What politicians in London, Paris, and Berlin understood in the 1920's that apparently Hoover and Hughes did not was the close relationship between Russian debts and Soviet trade. Moscow would agree to acknowledge her obligation to pay certain debts if it could get generous credits or loans for trade. The percentage of interest on these trade contracts would be slightly higher than normal to pay the pre-1917 Russian debts. In other words, the Kremlin paid old obligations in proportion to the lucrativeness of trade with a country. As long as the United States refused to grant diplomatic recognition and denied the Soviets long-term trading credits, Moscow refused to honor old obligations. Indeed, it was virtually impossible for Moscow to pay any foreign debts unless it was connected with trade credits because of the underdeveloped Russian economy. It should also be pointed out that before World War II, the Soviet Union never defaulted on an obligation which the Communists themselves contracted abroad.

Soviet trade representatives in America did try to settle accounts with private firms in order to restore trade with Russia. In 1927 they tried to reach an agreement with National City Bank,,J.P. Morgan & Co., and Guaranty Trust Company, which together maintained a claim against Moscow for $91 million. Charles E. Mitchell, the President of National City Bank, negotiated with Soviet agents in Paris, but he refused to promise long-term trade credits before the Soviets began repayment of debts. That ended the talks. American manufacturers, on the other hand, were

more anxious than the banks to do business with the Russians. Standard Oil of New York began oil purchases from the Soviets in 1924. In 1928 General Electric granted Amtorg a five-year, $26 million trade credit. A year later, Henry Ford contracted to build a factory in Nizhni-Novgorod. If the Department of State wanted the Soviets to repay government loans, it had to be prepared to offer the Kremlin at least a credit agreement, if not a loan, for trade.[50]

Soviet Russia wanted recognition from the United States in 1933 for many of the same reasons that Roosevelt wanted to grant it. Trade was one important factor. America was in a depression and needed to sell surplus goods abroad, and Russia was beginning her second Five Year Plan and sorely needed both machinery and foodstuffs. Trade, however, was not as important as the need for peace. Roosevelt wanted to handle the American economic crisis with domestic relief and reform and not make the success of his New Deal dependent on the uncertainties of world conditions. The President also did not want to divert time, energy, or resources from the New Deal to prolonged foreign intrigues and expensive military armaments. Joseph Stalin also needed peace. He had created a social civil war between city workers and rural peasants during the first Five Year Plan. He needed peace in order to build up Russian industry to the point where the nation could compete successfully in the ideologically anticipated world war with imperialism. Like the United States, the great energies of Russia were diverted inwardly. Both nations required peace and world stability to work out their domestic problems.

The greatest threat to Soviet security in 1933 came from Japan. Japanese field commanders had invaded Manchuria and encroached upon the

Amur River. Foreign Affairs Commissar Litvinov's subsequent offer for a non-aggression pact with Japan was rebuffed. There was a great fear in Moscow in 1932 and 1933 of a war with Japan, a repeat of the 1904-1905 war except it would probably be fought in Siberia instead of China. It was obvious from the way that the League of Nations handled the Manchurian affiar that neither London nor Paris wanted a diplomatic confrontation with Tokyo. In the minds of some paranoid Communist leaders, this may have been the great anti-Communist imperialistic alliance they had feared. Moscow decided to disentangle itself from Manchuria as gracefully as possible. In June 1933 Soviet and Japanese agents discussed the Soviet sale of its extensive interest in the Chinese Eastern Railway. In October (a month before the Roosevelt-Litvinov Accords), the talks ended abruptly in violent words. Until a final settlement was reached in late 1934 and a treaty signed early in 1935, there was the real fear of a Soviet-Japanese war in Asia. [51]

Litvinov's foreign policy in the early 1930's had three objectives. First, he wanted to isolate the Far Eastern crisis from the rest of world problems. He could do this if he could liquidate Russian interest in Manchuria, thereby eliminating a friction point with the Japanese and reaching a diplomatic rapproachement with the United States. Secondly, he had to avert a capitalist anti-Soviet coalition of Western powers. The Four Power Pact of July 15, 1933, among Britain, France, Germany, and Italy was not in the Soviet interest. Litvinov wanted to cultivate good relations with London, Paris, and Rome in order to isolate Berlin. And thirdly, Litvinov had to avoid or at least postpone a war with Hitler, Stalin's avowed enemy. [52]

Litvinov's chief immediate goal in 1933 was to win American recognition. Early in 1932 he had discussed the need for good Soviet-American relations with Secretary of State Stimson and other American officials in Geneva. Nothing had come from these talks. During the London Economic

Conference, he offered the promise of rich trade to Roosevelt's trusted advisors, William C. Bullitt and Raymond Moley. By summer of 1933, it seemed that American recognition was only a matter of time. Stalin was very pleased. [53]

Litvinov was no no position to argue technicalities with FDR in November. He wanted immediate American recognition as a diplomatic blow to Japan. Yet, he could not make concessions to the United States that Moscow had made to no other country or that the Politboro disapproved. FDR let Litvinov out of his dilemma by presenting agreements that were broadly worded, the details of which could be worked out later. Timing and cosmetic appearances were more important in November 1933 than substantive agreements, or so both Roosevelt and Litvinov seemed to believe. The principal deal was the one made on November 15, concerning the range of $75 million to $150 million debt settlement. The exact sum was to be negotiated later, and it would be paid "in the form of a percentage above the ordinary rate of interest on a loan to be granted to it [the Soviet Government] by the Government of the United States or its nationals..." [54] This statement caused considerable problems later, because Litvinov thought that Russia would get a large loan from the American government, whereas Roosevelt intended the agreement to mean that the United States would give Moscow credits to buy goods in America, or encourage private loans to the Russian state.

The American recognition was well received in Moscow, although the Roosevelt-Litvinov Accords were not made public (perhaps out of embarrassment over the concessions). Soviet Premier V. M. Molotov called it the greatest Soviet foreign policy achievement in 1933. Karl Radek wrote in

Izvestiia that President Roosevelt had taken a bold step to preserve peace in Asia. The first Soviet Ambassador to Washington was Alexander Troyanovsky, who had previously been the Ambassador to Japan. Roosevelt chose Bullitt as the American minister to Moscow. In his first dispatches from the Russian capital, Bullitt described the great anxiety there about a war with Japan; Stalin himself spoke with him about the need for American firmness in China. Bullitt warned him that the United States did not want war with Japan and would use nothing more than moral suasion against Tokyo. "Nevertheless," Bullitt reported, "the Soviet Union is so anxious to have peace that it is obvious that even our moral influence is valued very highly by the Soviet Government." [55]

When the war scare passed, however, the Soviets became less concerned with the cordiality of relations with the United States. The State Department prediction that when the Soviets got what they wanted they would become harder to deal with turned out to be absolutely correct. Bullitt had discovered on the day before Roosevelt granted recognition that Litvinov was obstinate on the debt issue. The Commissar complained that the Russian public debt had been used against the Soviets and that the private claims were grossly inflated (most of which were based on the 1914 ruble, which was now worthless because of the runaway Russian inflation from 1917 to 1924). Litvinov stayed in Washington shortly after the signing of the Accords to discuss further the debt question. No agreement was reached. Back in Moscow, Litvinov leveled with Bullitt. He told the American Ambassador that Russia was not really interested in a large foreign trade since the emphasis of the Five Year Plan was to make Russia a wealthy, self-sufficient nation. Russia would trade with the United States only if the

latter granted it long-term credits, and the United States could take no more than $60 million worth of goods out of Russia a year in order to pay the interest and part of the principal on the loan. [56]

In Washington, Secretary of State Hull, who had been absent since November 11 while representing the United States at the Pan American Conference at Montevideo, negotiated with Soviet Ambassador Troyanovsky. He told the Ambassador that the American government, through the Export-Import Bank, was willing to give a trade credit to the Soviet Union of up to $11 million provided some agreement could be reached on the debt question. In February 1934, Litvinov offered Bullitt a settlement of $100 million with no interest provided the United States supplied a direct governmental loan. Hull informed Bullitt that that offer was unacceptable to the President, since FDR had never intended the Accords to mean a direct loan to the USSR. He further stated that FDR had supported a ruling by the Export-Import Bank that no credits would be given to Moscow until the debt issue was satisfactorily settled. Litvinov's response to this position was, "We could remain on friendly terms with the United States without mutual trade, but I fear that the United States would not remain on friendly terms with the Soviet Union." [57]

Part of the reason for Soviet obstinacy was the change in the international situation. In November 1933 Litvinov felt compelled to reach an agreement with Roosevelt; by the spring of 1934, he did not. The situation had improved in Asia for the Russians. It appeared that Japanese military designs had shifted south toward China rather than toward Siberia. In Europe, Moscow was moving closer to London and Paris in the face of German military reconstruction. On June 12, 1934, the Soviet Union entered the League of Nations, which Litvinov believed could help to isolate Germany.

Six months later Moscow and Paris signed a diplomatic consultive pact, which in May 1935 became an alliance. So with new security through collective defense in Europe and the crisis passing in Asia, Russia no longer felt the dire need for friendship with the United States. Meanwhile, every nation except Finland defaulted on their wartime debts to the United States. As an international obligations abrogater, Moscow was now in good company.

In April 1934 Litvinov informed Bullitt that his government had decided that it would take a credit instead of a loan, a credit amounting to twice the figure of the settled debt figure. This plan, and a similar one offered by Troyanovsky in Washington, were totally unacceptable to Hull. Meanwhile, Congress passed the Johnson Act that prohibited loans to foreign nations in default of their wartime debts. In an official opinion by Attorney General Homer Cummings, the Johnson Act applied to the Soviet government as the successor to prior Russian governments. This meant that legally Moscow could not get long-term credits in the United States until it settled its obligations. Litvinov was not moved. The personal relations between the Commissar and Bullitt cooled sharply, so that after the Ambassador returned to Washington in 1936 he was reassigned by FDR to the Embassy in Paris. From the summer of 1934 until the summer of 1935 there were sporadic periods of negotiation, but no debt settlement and no trade agreement. Finally in July 1935, Hull agreed to drop American tariff barriers on Russian goods if the Soviets promised to buy at least $30 million worth of goods in the United States per year. This agreement remained in operation until World War II. But there never was any settlement of the debt question. During the Second World War, it became a moot issue when Roosevelt extended $11.1 billion of Lend-Lease support to Stalin.[58]

The Litvinov Assignment

Nearly all of the agreements of the Roosevelt-Litvinov Accords were broken at one time or another.[59] As it has been seen, the "gentlemen's agreement" on the debt issue amounted to nothing. In August 1935 Hull vigorously protested that the Soviet Union had broken its pledge not to interfere in domestic American affairs after the Seventh Congress of the Communist International in July. Of course, the Soviet government denied any connection with the Comintern or the American Communist Party, just as Litvinov had in 1933. American citizens, including Bullitt, were harassed in various ways in Russia. The Kremlin probably considered it too subversive to their regimented society to allow foreigners to enjoy the civil liberties that Americans took for granted. The most important agreement as far as the results achieved, however, was the last one made, the Litvinov Assignment. This note resulted in the American government's acquisition of over $8 million (the only money ever gotten out of the Accords), not by diplomacy but by court litigations in the United States.

The Litvinov Assignment had four parts to it. The first sentence prefaced the agreement as "preparatory to a final settlement of the claims and counter-claims" between the two governments. Secondly, Litvinov pledged the Soviet government to abstain from any American court rulings or litigations that involved Soviet claims to property in the United States "as the successor of prior Governments of Russian, or otherwise....." This did not say that the Soviet government could not sue in American courts on its own behalf, only that it surrendered all legal claims to Russian interests in America acquired before October 1917. In the third part, the Soviet government assigned to the American government those interests which it

had just renounced, providing, fourthly, that the latter informed the Soviet government of such funds realized. The only claim specified was that of the Russian Volunteer Fleet, for which the United States owed the Russian state $1,412,532.35. In a short note, FDR accepted the assignment under the stipulations so stated.[60]

It is doubtful whether Roosevelt knew exactly what this assignment included. The Department of State, through its legation in Riga, Latvia, had made a study of Soviet agreements with other nations on the same issue. The Division of Eastern European Affairs prepared some twenty drafts of desired conventions, as well as the Treasury Department's drafts on financial matters. But when it came to the debt issue, where Litvinov was adamant, FDR in his cavalier manner dismissed the debt issue as less important than other provisions.[61]

There was a legal problem with the recognition of the Soviet regime which the State Department believed had to be settled before recognition was granted. Boris Bakhmetyev had been the Ambassador of the Provisional Government of Russia in the United States since July 15, 1917. When the Bolshevik coup d'etat overthrew his government, he was recalled by the Soviets. But the American government refused to recognize the Soviets, so Bakhmetyev remained the official Russian representative in the United States until he retired on June 30, 1922. For five years he was an ambassador without a government. From 1922 to 1933, the State Department recognized Serge Ughet, the Provisional Government's financial attache, as the only legal representative of the Russian state in America. Embassy property, bank accounts of the Russian governments before October 1917, and Russian claims against American firms that had not fulfilled wartime contracts were all under Ughet's authority. He sued in American courts in

the name of the Russian state (abstractly, a nation without a government) and conducted diplomatic affairs.

According to United States Supreme Court rulings in regards to Mexican claims, somewhat similar in their diplomatic nature to the Russian situation, the act of recognition of a foreign government by the President is legally retroactive. That is, recognition validates all acts of the recognized government since its historical creation. In the Mexican cases, the legal complications were not so very great since the period of diplomatic non-recognition was only a few years during the Wilson Administration. In the Russian cases, the legal complications of State Department policy toward the Soviets were considerable. For sixteen years Russian companies that had been nationalized in their own homeland continued to conduct business in the United States. Diplomatic recognition of Moscow in 1933 would legally invalidate all contracts, claims, and rights involving the Provisional Government and Russian private corporations with American citizens.

A State Department Memorandum of July 27, 1933, recommended that the President reach an agreement with the Soviet Commissar on the disposition of Russian government property and rights in America from 1917 to 1933. If no agreement could be reached, then the Soviets should be made to abstain from taking action in American courts to press their claims. The memorandum also suggested that there be an official provision that the act of recognition would not be legally retroactive.[62]

Part of the legal problem was solved on August 25, 1933, when Ughet assigned to the American government all Russian government assets and claims. This included bank deposits of $5,186,770.97 in three New York banks (Guaranty Trust, New York Trust, and National City Bank), and

$3,001,650.42 worth of claims against various American companies.[63] These were the only specific assets that Ughet knew, but he admitted that there might be others. Several of these claims were matched by American corporate claims against the Soviet Union for confiscation of their property in Russia. Recognition might mean that some New York banking house would suffer double jeopardy: they would lose their claims against the Soviet government and would be accountable for all transactions with Bakhmetyev and Ughet.

In a Department of State Memorandum of October 25, 1933, the suggestion was made that the United States government take over Russian state property in America as partial settlement of the public debt. At the same time, the Soviet government should acquiesce in the disposition of Provisional Government property in the United States from November 1917 to November 1933. If the Soviets refused to assign such rights to the American government, then they should be made to renounce its legal title to them pending the negotiation of claims.[64]

There were still two more problems. One concerned the claims of private American bondholders of the Tsarist government. Their claims had to be accounted for as well as those of the American government. The other question concerned the status of Russian corporate deposits and assets in the United States. Under Soviet law, those funds belonged to the Soviet government by the sequester decrees. But American courts continuously since the early 1920's refused to honor the effects of Soviet laws upon business conducted in the United States as long as the national government refused to recognize the Soviet government. It was one Edgar Lowell of the Premium Credit Company who brought this problem to the attention of Presidential advisers Louis Howe and William Bullitt. Lowell strongly

urged that if the Soviet government acquired any legal right to Russian corporated assets in America that it should assign that right to the American government in partial settlement of the debt question. [65]

Lowell wrote again to Bullitt on November 20, 1933, that he was not sure whether the Accords included Russian corporate assets or not. [66] Bullitt's response was not reassuring. Early in January, Lowell visited Eastern European Division Chief, Robert F. Kelley, and reported to Bullitt that Kelley seemed interested, if not surprised, by Lowell's idea. [67] A month later, Kelley informed Lowell that no action would be taken at the time by the government on the Russian corporate assets. [68]

A second incident occurred in March when Troyanovsky brought a recent New York Court of Appeals case to the attention of Hull. He was apparently upset that the highest New York court had ruled in favor of pre-Soviet Russian companies in the United States. "The Ambassador further suggested," Hull recorded in a memorandum of March 26, 1934, "that under the agreement in the conversations with Litvinoff [sic] in November last, amounts going to nationals of either country should be turned over to their respective governments and handled through them. He [Troyanovsky] said that he and the Russian claimants felt, or at least they felt, they were entitled to attention by our Government to the effect of this New York Court decision." [69]

These two pieces of evidence seem to imply that FDR did not have in mind Russian corporate assets in America that were allegedly confiscated by the Soviet Union when he signed the Accords. Probably, he and his State Department experts only meant the assignment to include those assets and claims that had belonged to the Russian state and not to its private citizens in the United States. On the other hand, the exact wording of the assignment was broad enough to include those claims if the State

Department so chose. The key phrase was "amounts admitted to be due or that *may be found to be due it* [Soviet government] as the successor of prior governments of Russia, or *otherwise* ...." (italics added). "Otherwise" could be interpreted as Soviet claims to Russian private property that was nationalized by Soviet law. The other underlined words could mean that the United States could claim any assets that American courts ruled belonging to the Soviet government by assignment. These questions were legal ones, not diplomatic, and had to be handled by the Department of Justice.

It is not known who made the decision that the Justice Department would begin litigations to recover Russian private funds in the United States. It appears from the documentary evidence available at the National Archives that the initiative came from the Treasury and Justice Departments rather than the State Department. The three principal individuals who would handle the government's cases in the courts for the next six years were Henry Munroe of the Treasury Department and Paul A. Sweeney and David E. Hudson of the Justice Department. They prepared the strategy and sought from the State Department the information they needed to take into court. But much of the official correspondence among Hull, Bullitt, Litvinov, and Troyanovsky that was later submitted as evidence to prove the government's cases was written in the State Department according to the counsel's specifications.

The decision to litigate the Federal government's claim was made in the summer of 1934 at the time the debt and trade negotiations collapsed in Moscow. There well may have been a direct relationship between the two. In a letter to Secretary of the Treasury Morganthau, William Phillips gave the State Department's encouragement to take the Litvinov

Assignment to the courts. [70] On September 14, 1934, United States Attorney Martin Conboy gave official notice to Robert Kelley of his filing federal suits ordered by the Attorney General against two large New York banking firms. [71] Three days later, Attorney General Homer Cummings rendered his official opinion to Hull that the Litvinov Assignment included not only Russian state property in the United States, but also Russian corporate property that the Soviet government had legally confiscated by its own law. [72] By October 1, 1934, the Justice Department had initiated seven suits for $6,639,910.62 with eight more cases, involving over $4 million, in preparation. [73] Thus began one of the most important legal contests ever fought in American courts over the constitutionality of Presidential diplomacy.

NOTES

[1]William Phillips, Ventures in Diplomacy (privately printed, 1952), p. 158.

[2]Foreign Relations of the United States. Diplomatic Papers. The Soviet Union, 1933-1939 (Washington, 1952), pp 28-29. Hereafter cited as FRUS: Soviet Union, 1933-1939. For a detailed analysis of the Roosevelt-Litvinov Accords, see Donald G. Bishop, The Roosevelt-Litvinov Agreements (Syracuse, 1965).

[3]Ibid., pp 29-36.

[4]Ibid., pp 26-27.

[5]Quoted by John Basset Moore, "Fifty Years of International Law," 50 Harvard Law Review.395 (1937), p 428.

[6]Edward M. Bennett, Recognition of Russia (Walton, 1970), pp 11-18; Robert Paul Browder, The Origins of Soviet-American Diplomacy (Princeton, 1953), pp 3-4; William Appleman Williams, American-Russian Relations, 1781-1947 (New York, 1952), pp 85-129; Taylor Cole, The Recognition Policy of the United States Since 1901 (Baton Rouge, 1928), pp 53-72. Also see Malbone W. Graham, "Russia, 1917-1933: An Interpretation," American Political Science Review, XXVIII, 3 (June 1934), pp 387-409.

[7]Bennett, Recognition of Russia, pp 18-47; Browder, Origins of Soviet-American Diplomacy, pp 3-17. Also see George F. Kennan, Soviet-American Relations, 1917-1920, 2 vols. (New York, 1967).

[8]Robert K. Murray, The Harding Era (Minneapolis, 1969), pp 348-49; Browder, Origins of Soviet-American Relations, p 18.

[9]Memoirs of Herbert Hoover, the Cabinet and the Presidency, 1920-1933 (New York, 1953), p 182.

[10]Bennett, Recognition of Russia, p 54.

[11]Quoted by Charles Evans Hughes, Foreign Relations (Republican National Committee, 1924), pp 35-36.

[12]Charles Cheney Hyde, "Charles Evans Hughes," in Samuel Flagg Bemis, ed., The American Secretaries of State and their Diplomacy, Vol. X (New York, 1929); Dexter Perkins, Charles Evans Hughes and American Democratic Statesmanship (Boston, 1956); Merlo J. Pusey, Charles Evans Hughes, 2 vols, (New York, 1951), II, 411-618; Betty Glad, Charles Evans Hughes and the Illusion of Innocence (Urbana, 1966), p 121.

[13]Charles Evans Hughes, "The Centenary of the Monroe Doctrine," International Conciliation, No. 194 (January 1924), pp 3-22; quotes from p 11 and pp 17-18, respectively.

[14]"Relations with Russia," Autobiographical Notes, Charles Evans Hughes Papers, Library of Congress; Hughes, Foreign Relations, pp 35-45.

[15]Warren G. Harding, "On Foreign Relations" (Harding Memorial Association, Marion, Ohio, no date), p 5.

[16]Papers Relating to the Foreign Relations of the United States, 1923, II, 788.

[17]Cole, Recognition Policy of the United States, pp 19-20.

[18]Thomas Jefferson to Gouveneur Morris, November 7, 1792, in Norman A. Graebner, ed., Ideas and Diplomacy (New York, 1964), p 54.

[19]William Seward to Alvin P. Hovey, March 8, 1866, Diplomatic Correspondence (Washington, 1868), Part 2, 1866-67, p 630.

[20]Cole, Recognition Policy of the United States, pp 32-51.

[21]Ibid., pp 62-63.

[22]Pusey, Hughes, II, 523-26; Murray, Harding Era, pp 349-51.

[23]Bennett, Recognition of Russia, pp 69-75.

[24]Henry L. Stimson, The Far Eastern Crisis (New York, 1936); Stimson and McGeorge Bundy, On Active Service in Peace and War (New York, 1948), pp 220-63; Robert Ferrell, American Diplomacy in the Great Depression (New Haven, 1957), pp 194-214, passim; Richard N. Current, "The Stimson Doctrine and Hoover Doctrine," in Armin Rappaport, ed., Essays in American Diplomacy (New York, 1967), pp 229-51.

[25]Bennett, Recognition of Russia, p 76.

[26]FRUS: Soviet Union, 1933-1939, pp 1-2.

[27]Stimson and Bundy, On Active Service, pp 292-98.

[28]Lt Col J. G. McIlroy to Assistant Chief of Staff Smith, February 23, 1933, FRUS: Soviet Union, 1933-1939, p 3.

[29]Bullitt to Roosevelt, July 8, 1933 in Edgar B. Nixon, ed., Franklin D. Roosevelt and Foreign Affairs, 3 vols. (Cambridge, 1969), I, 293-94.

[30]Memoirs of Cordell Hull, 2 vols., (New York, 1948), I, pp 292-300; Hull to Roosevelt, September 21, 1933, FRUS: Soviet Union, 1933-1939, pp 12-13.

[31]John Morton Blum, ed., From the Morganthau Diaries, 2 vols. (Boston, 1959, 1964), I, 55; Herbert Feis, 1933: Characters in Crisis (Boston, 1966), pp 307-311.

[32]FRUS: Soviet Union, 1933-1939, pp 6-11.

[33]Ibid., pp 14-16.

[34]Ibid., pp 16-17.

[35]Ibid., pp 17-18; The Secret Diary of Harold L. Ickes, 3 vols. (New York, 1953-1954), I, pp 113-14.

[36]Memoirs of Cordell Hull, I, 300-301; Phillips, Ventures in Diplomacy, pp 156-57, Feis, 1933, pp 317-318; Beatrice Farnsworth, William C. Bullitt and the Soviet Union (Bloomington, 1967), pp 97-98. Also see Eleanor Roosevelt, This I Remember (New York, 1949), p 134; and Frances Perkins, The Roosevelt I Knew (New York, 1946), p 143.

[37]Secret Diary of Harold L. Ickes, I, 117-18; Phillips, Ventures in Diplomacy, pp 157-58; Arthur Upham Pope, Maxim Litvinoff (New York, 1943), pp 293-94.

[38]Farnsworth, Bullitt, pp 102-106; Feis, 1933, pp 324-26.

[39]Franklin D. Roosevelt, On Our Way (New York, 1934), pp 109, 114, 117-18; 134-39; Raymond Moley, After Seven Years (New York, 1939), pp 207, 213; James MacGregor Burns, Roosevelt: The Lion and the Fox, (New York, 1956), pp 176-77, 247; William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal, 1932-1940 (New York, 1963), pp 197-99, 214-15; Robert A. Divine, "Franklin D. Roosevelt and Collective Security, 1933," Mississippi Valley Historical Review, XLVIII, 1 (June 1961), pp 57-59.

[40]Green Haywood Hackworth, Digest of International Law, 8 vols. (Washington, 1940-1944), I, 298-305; Max Beloff, The Foreign Policy of Soviet Russia, 1929-1941, (London, 1949), I, 120; Browder, Origins of Soviet-American Diplomacy, pp 25-37.

[41]Undersecretary of State W. R. Castle, Jr., to Fred L. Eberhardt, March 3, 1933, FRUS: Soviet Union, 1933-1939, pp 3-5.

[42]Browder, Origins of Soviet-American Diplomacy, pp 37-39; Beloff, Foreign Policy of Soviet Russia, 1929-1941, I, 120; George F. Kennan, Russia and the West under Lenin and Stalin (Boston, 1961), p 297; Handbook of the Soviet Union (New York, 1936), pp 294, 363, Norman Walt Harris Memorial Foundation, University of Chicago, "The Soviet Union and World Affairs" (stenciled copy, 1935), p 27.

[43]Browder, Origins of Soviet-American Diplomacy, pp 108-109; Bennett, Recognition of Russia, pp 137, 187; Leuchtenberg, Roosevelt and the New Deal, p 215; Feis, 1933, p 329; George F. Kennan, Memoirs, 1925-1950 (Boston, 1967), pp 56-57. Also see The Public Papers and Addresses of Franklin D. Roosevelt, II, pp 489-93, and III, pp 11-12.

[44]Leo Pasvolsky and Harold G. Moulton, Russian War Debts and Russian Reconstruction (New York, 1924), pp 17, 19, 21; Elisha M. Friedman, Russia in Transition (New York, 1932), pp 501-504.

[45]Pasvolsky and Moulton, Russian War Debts, pp 181-82; Bishop, Roosevelt-Litvinov Agreements, pp 140-41; Lancelot Lawton, An Economic History of Soviet Russia, 2 vols. (London, 1932), I, pp 78-81, 102-103.

[46]Lawton, Economic History of Soviet Russia, I, 102-104; Edward Hallett Carr, The Bolshevik Revolution, 1917-1923, 3 vols. (New York, 1952), II, pp 58-100. For the official Soviet explanation for nationalization of industry see N. Bukharin and E. Preobrazhensky, The ABC of Communism (Ann Arbor, 1966).

[47]Department of State Memorandum of July 27, 1933, FRUS: Soviet Union, 1933-1939, p 11; Louis Fischer, The Soviets in World Affairs, 2 vols. (London, 1930), I, 300; Louis Fischer, Why Recognize Russia? (New York, 1931), pp 249-252; Bishop, Roosevelt-Litvinov Agreements, pp 141-44.

[48]Fischer, Why Recognize Russia?, pp 239-48. For an accounting of American loans to the Provision Government, see The Committee on the Judiciary, "Loans to Foreign Governments," Resume of the Laws, Senate Document No. 86, 67th Congress, 2nd Sessionn (December 6, 1921), pp 89-176.

[49]See Harold G. Moulton and Leo Pasvolsky, World War Debt Settlements (New York, 1929), pp 63-69, 419-27.

[50]Fischer, Soviets in World Affairs, II, pp 701-703, 766-69, 811-12; Friedman, Russia in Transition, pp 515-16.

[51]For a review of Soviet foreign policy in this period, see Jane Degras, ed., Soviet Documents on Foreign Relations, 3 vols. (London, 1953), III, pp 17-35; Robert D. Warth, Soviet Russia in World Politics (New York, 1963), pp 175-81; Adam B. Ulam, Expansion & Coexistence. The History of Soviet Foreign Policy, 1917-67 (New York, 1969), pp 133-35, 167-81, 197-207.

[52]Beloff, Foreign Policy of Soviet Russia, 1929-1941, I, pp 90-91.

[53]Pope, Litvinoff, pp 278-87; also see Xenia Joukoff Eudin and Robert M. Slusser, Soviet Foreign Policy, 1928-1934. Documents and Materials, 2 vols., (University Park, 1967), II, pp 432-34, 439-59, 533-54.

[54]FRUS: Soviet Union, 1933-1939, pp 35-36.

[55]For comments by Molotov and Radek, see Degras, Soviet Documents on Foreign Relations, III, pp 46-48, and Eudein and Slusser, Soviet Foreign Policy, 1928-1934, II, 587-90, respectively; Bullitt to FDR, December 24, 1933; FRUS: Soviet Union, 1933-1939, p 54.

[56]FRUS: Soviet Union, 1933-1939, pp 25-26, 62.

[57]Ibid., pp 66-69; quote on p 69.

[58]Ibid., pp 75-111, 119-21, 186-87; Nixon, Roosevelt and Foreign Affairs, I, pp 628-30, and II, 210-11; Memoirs of Cordell Hull, I, 303-305, 660; Kennan, Memoirs, pp 73-74, 79-81. The Soviets agreed on October 18, 1972, to repay $722 million of the Lend-Lease debt, Time, 100 (October 30, 1972), p 93.

[59]For an excellent analysis of the terms and the results of the Accords, see Bishop, Roosevelt-Litvinov Agreements.

[60]FRUS: Soviet Union, 1933-1939, pp 35-36.

[61]Memoirs of Cordell Hull, I, 299-300; Bennett, Recognition of Russia, pp 120-21.

[62]FRUS: Soviet Union, 1933-1939, pp 8-9.

[63]Department of State File, 411.61, Assignments/1-1/4 and 411.61 Assignments 2a, National Archives.

[64]FRUS: Soviet Union, 1933-1939, pp 23-24.

[65]Edgar Lowell to Louis Howe, November 8, 1933, Department of State File, 411.61 Assignments/1-1/2, and same to William C. Bullitt, November 13, 1933.

[66]DSF 411.61 Assignments/2-3/5.

[67]Lowell to Bullitt, January 15, 1934, DSF 411.61 Assignments/3-2/5.

[68]Kelly to Lowell, February 15, 1934, ibid.

[69]FRUS: Soviet Union, 1933-1939, p 71.

[70]DSF 411.61 Assignments/4a.

[71]DSF 411.61 Assignments/5-1/4.

[72]DSF 411.61 Assignments/6.

[73]Memorandum for the Assistant Attorney General, DSF 411.61 Assignments/19-1/2.

CHAPTER II

JUDICIAL INTERPRETATION OF NON-RECOGNITION

The diplomatic "non-existence" of the Soviet government was a legal problem that plagued American courts all through the 1920's and 1930's. While the State Department refused to grant Moscow diplomatic recognition after 1917, the courts were bound by both tradition and inclination to ignore the new Russian regime as long as the political branch of government also did. Yet case after case raised serious judicial questions as to the rights Russian individuals and property enjoyed in this country beyond Federal governmental authority. Should the courts ignore the legal rights of former Russian subjects in the United States, and the rights of American citizens and business interests with Russians because the State Department opposed the recognition of the Soviet Union for purely political reasons? There was also the problem of Russian property in Western countries that under Soviet confiscatory laws belonged to the Soviet government. To acknowledge Soviet nationalization of property not located within the Soviet Union would be to deny the constitutional protections guaranteed in the legal forums of the West.

The legal problems also had political overtones. Much of the Russian property in the West belonged to the former Tsarist government and the Russian bourgeoisie and aristocracy--the victims of the Communist social revolution in Russia. Like the French emigres after the revolution of 1789, many Russian noblemen fled their country and formed political pressure groups in foreign countries. From Paris and other European capitals they gave moral and alleged financial support to anti-Bolshevik forces inside Russia. Many of the Russian emigres never lost hope after the defeat of White armies in the Russian civil war that someday they could return to their homes following an anti-Communist revolution. To finance their fantasies, the exiles sought to recover any Russian property in the West that the courts there would award them.[1]

Constitutional Law of Recognition

The Supreme Court had formerly established the constitutional interpretation that diplomatic recognition of a foreign state or government was a

purely political question that could not be challenged by the courts. When the Department of State certified the recognition of a foreign state, the courts were bound to grant it legal comity; i.e., judicial respect of foreign laws that may effect a case in American courts. Otherwise, the courts refused to acknowledge the legal personality of a foreign state that had not been accorded de jure recognition by the Executive branch.

As early as 1808, the Marshall Court had ruled that diplomatic recognition was a political question. In a prize case, the Supreme Court had given no judicial accord to the independence of Haiti, which had successfully rebelled against France a decade before, because the White House had never granted it de jure recognition.[2] Ten years later, in a case similar to the one above, Justice Joseph Story wrote for the Court that "no doctrine is better established, than it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition ... courts of justice are bound to consider the ancient state of things as remaining unaltered."[3]

The Supreme Court had heard numerous cases which raised questions of private property claims on territory that had shifted hands by treaty or where there were conflicting political claims. In 1829 the Marshall Court had refused to give a judicial interpretation to the American treaty of 1803 with France or the Adams-Onis Treaty of 1819 that had established the American acquisition of the Louisiana Territory and the Floridas. Chief Justice John Marshall, who had once served as a diplomat in Paris and as Secretary of State, ruled for a unanimous Court that "the judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty, commonly, is to decide upon individual rights according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would be hesitant to pronounce it erroneous."[4] In subsequent cases, the Court had consistently ruled that it had no authority to question the interpretation of territorial claims and treaties by the State Department, with the only qualification that no expressed prohibition of the Constitution had been violated.[5]

The judicial question of recognition, however, was far more simple than the political realities. The Court heard cases that involved the legal authority of de facto states to enter into contracts with American citizens. In 1852 the Taney Court invalidated a contract between Thomas J. Chambers, a general in

the Texan army, and some Cincinnati businessmen. Chief Justice Roger B. Taney reasoned that even though contract had been made in Cincinnati in 1836, the year of the successful Texan revolution against Mexico, it was not binding because the President had not granted the new republic de jure recognition until a year later. Since the official foreign policy of the United States was neutrality during this war, the contract was not only void but also criminal. Taney further stated that the Executive decision to grant diplomatic recognition was a political question, not judicial, and the courts were bound to abide by it.[6]

In 1877 the Supreme Court heard a case involving acts by the State of Virginia during the Civil War. This raised the question of whether the Confederacy had been a legal government from 1861 to 1865. Eight years before this case, the Court had ruled that secession had been unconstitutional and the Southern states had engaged in unlawful rebellion.[7] Justice Stephen J. Field, speaking for a unanimous Court in 1877, acknowledged the political fact that the Confederacy had existed as a de facto government for four years, but had never existed in law as a de jure state, since it had failed on the battlefield to win its independence or received any foreign recognition. He further differentiated two types of de facto governments: ones that replace prior governments in the political operation of the same state, and those that successfully won their independence from a parent state. In both regards, the Confederacy had never existed legally. Field concluded that when the Southern states had acted within their powers as states under the Constitution prior to 1861, they acted lawfully, but when they acted in a sovereign capacity during the war, they had acted illegally.[8]

The Supreme Court also applied these constitutional standards to cases involving criminal charges. In an 1890 murder case, it ruled that whether the scene of the murder had been on American territory or foreign was a question for the State Department, not the courts. Speaking for a unanimous Court, Justice Horace Gray had written that "Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges...."[9]

The Supreme Court in 1897 tackled the problem of the international legal status of a de facto foreign revolutionary government before it received de jure recognition from the United States. The case arose from a private claim by an American citizen against a revolutionary government in Venezuela in 1892. Chief

Justice Melville Fuller ruled for a unanimous Court that the plaintiff had no legal grounds to bring his suit before an American court against a foreign government. Fuller began with the basic premise of comity: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." He reasoned that this rule applied to "the agents of governments ruling by paramount force as matter of fact." The revolutionary regime in question had indeed been successful in routing its successor, and it had received official American recognition in 1892; therefore the acts of the revolutionaries were binding in American courts even prior to diplomatic recognition. Fuller concluded that the plaintiff had to seek redress of his grievances from the political branch, rather than the judicial: this was a question of diplomacy.[10]

The Court considered two similar cases together in 1918 arising from the political chaos in Mexico between 1913 and 1917. On March 6, 1913, General Venustiano Carranza had risen in revolt against General Victoriano Huerta's regime. Seven months later, Francisco Villa, acting under Carranza's command, took the city of Torreon, where he had confiscated a shipment of hides from the Mexican Martinez & Company. Villa sold the hides to Finnegan-Brown Company, which in turn sold them to the Central Leather Company in the United States. Meanwhile, one Oetjen sued for the recovery of these hides in American courts based on his claim from Martinez & Company. The second case involved a similar conflict of claims over a consignment of lead bullion held in bond at El Paso, Texas.

The Court unanimously found against the plaintiffs in both cases: Oetjen v Central Leather Company and Ricaud v American Metal Company.[11] Justice John H. Clarke wrote both opinions. "...When a government which originates in revolution or revolt is recognized by the political department of our government as the de jure government of the country in which it is established," he observed, "such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its exercise."[12] Under this interpretation, the acts of a revolutionary movement were not legally binding in American courts until, and unless, the President granted it de jure recognition; after recognition, all acts of that government were considered legally binding, even acts before the date of recognition. Therefore, a foreign

revolutionary action might be deemed void in an American court in one year, and found valid the next year pursuant to diplomatic recognition.

In this particular matter, Clarke found that the Wilson Administration had accorded de facto recognition to the Carranza government in October 1915 and de jure recognition in August 1917. That diplomatic act had the legal effect of validating all actions by the Carranza forces since March 1913. Therefore, the plaintiffs lost their cases in both suits. Clarke concluded that it was the political decision of the State Department to recognize Carranza that had made property confiscations in Mexico palatable in American courts. He further noted that "To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."[13]

Following this doctrine, both federal and state courts in the United States refused to acknowledge the Soviet government as a sovereign entity following the Bolshevik Revolution. Federal Circuit Courts of Appeal in California and New York in three admiralty cases ruled that the Russian Soviet Federated Socialist Republic (RSFSR)--the parent state of the Union of Soviet Socialist Republics, which was formed in 1923--could not sue in American courts because it was not a sovereign acknowledged by the American government.[14] At the same time, a Circuit Court ruled that Boris Bakhmetyev, the Ambassador of the Provisional Government, could represent the interests of the Russian state in American courts, since he was the only Russian diplomatic representative that the State Department acknowledged.[15] In this 1919 case, the court differentiated between a "state," which once recognized is perpetual, and "government," which is the political organ of the state and dependent on diplomatic recognition by other nations before it succeeds to the rights of the former government in international law.[16]

For sixteen years American courts refused to give effect to the Soviet laws of nationalization in relation to Russian private property located in the United States by reason of non-recognition. The principal court that handled this type of case was the New York Court of Appeals (that state's highest court), because most of the Russian corporate property in the United States was located in New York City. The leading cases were Wulfson v. RSFSR, decided on January 9, 1923, and RSFSR v. Cibrario, decided two months later.

The first case involved a suit by Max Wulfson, a New York dealer in furs, for recovery of pelts in Russia that were confiscated by the Soviets. His argument was that the RSFSR could not enjoy sovereign immunity in American courts simply because it was not diplomatically recognized by the United States. Judge William S. Andrews, speaking for six of the seven judges of the Court of Appeals, rejected that argument, since no American court was competent to judge the actions of a de facto foreign government. Andrews concluded that the Soviets could not be sued in New York since the courts were not the place for redress against foreign countries.[17]

The Wulfson case was significant for two reasons. It was the first case in which a major American court recognized the de facto existence of the Soviet government. Recognition, Andrews stated, did not create states; it only established diplomatic relations between equally sovereign nations. The case also decided that Soviet confiscatory laws were valid in the eyes of American courts so far as they affected property inside the Soviet state. Whether those laws were equally valid concerning Russian property outside of Russia was a question that the Court of Appeals would answer negatively in later cases.

The Cibrario case established the rule that the Soviet government itself could not sue in New York courts. Judge Andrews, delivering the opinion of a unanimous court, wrote that comity among nations, the respect that the courts of one nation gives to the laws of another, was a privilege based on political recognition. He cited a public statement by Secretary of State Colby and another by his successor, Charles Evans Hughes, on American policy toward Communist Russia to the effect that there was a state of enmity between the two states that could not allow legal comity in the courts. "We should do nothing to thwart the policy which the United States has adoped," the judge ruled. In other words, the Court of Appeals supported a legal parallel to the diplomatic policy of non-recognition. But Andrews added in his opinion a new element to legal thought on Soviet confiscations: comity would not be granted in New York courts if it would mean a conflict with the public policy of the state as interpreted by its courts. What Andrews was adding in the form of obiter dictum (extraneous remarks that do not directly relate to the specific case at hand) was that the Court of Appeals did not have to enforce any Soviet laws, even after diplomatic recognition by the government in Washington, if doing so would violate the constitution and laws of New York

which did not allow public expropriation of property without good cause and just compensation.[18]

The interesting thing about the Cibrario case was that it did not involve any confiscatory laws or Russian property rights before 1917. Cibrario was commissioned by the Soviet government in 1918 to purchase photographic equipment in the United States, for which the Soviets deposited about a million dollars with the City National Bank of New York. Cibrario absconded with the money, and the Soviet government appealed to New York courts for restitution. The Cibrario case involved a right in equity that the Court of Appeals would have defended in almost any other circumstance. The effect of the decision was that the Soviet Union had no legal rights of contract in the United States, even though the Department of State allowed it to trade in this country. This legitimate Soviet claim was not satisfied until 1942.[19]

Foreign Court Cases

If the Cibrario case contradicted the business reality of the facts involved, it was consistent in principle with decisions in other capitalistic nations. Immediately after the Bolshevik Revolution neither English nor French courts took notice of any political changes in Russia, and continued to adjudicate cases involving Russians according to Tsarist and Provisional Government laws. For example, in 1921 Justice Roche of the King's Bench of Great Britain found in favor of the Estonian Company for Mechanical Woodworking in its suit against an American firm for rights to plywood confiscated in Russia from the former and sold to the latter by the Soviets for resale in England. Justice Roche refused to recognize the validity of Soviet expropriation of the Company for Mechanical Woodworking's mill and stock in Russia, and therefore invalidated the claim of James Sagor and Company to the same stock sold to it by the Soviet government.[20]

The English Court of Appeals, however, reversed this decision in May 1921. There were three written opinions in this case, Luther v. Sagor. The principal fact which altered the case was that the British government concluded a trade agreement with the Soviet Union on March 16, 1921, while the case was under appeal. The Foreign Office provided the court with a statement that it considered L. B. Krassin of the RSFSR a bona fide foreign delegate in Great Britain representing a de facto government. This was sufficient reason for Lord Justice Banks to reverse the lower court's decision. He wrote that de facto recognition required the English courts to honor the acts of a de facto government. For precedents, Banks cited two cases from the

American Supreme Court on the legal effect of political recognition.[21] Lord Justice Warrington agreed with Roche's ruling that political de facto recognition of the RSFSR by the Foreign Office altered the facts enough to reverse the verdict. He, too, relied on American precedents.[22]

The third opinion in Luther v. Sagor was different in its approach from the other two. Lord Justice Scrutton asserted that de facto recognition was not retroactive in effect, but became legally binding on the courts of the recognizing power only from the date it was granted. He raised the subject of comity, and observed that English courts in the past had refused to extend comity in situations where it would clash with common law and morality. But Scrutton was not dissenting with the final judgment of the Court, since the Foreign Office had established the national policy for the Court. He concluded that "the responsibility for recognition or non-recognition with the consequences of each rests on the political advisors of the Sovereign and not on the judges." In this case, he did not wish to embarrass the foreign policy of Prime Minister David Lloyd George and Foreign Secretary Lord Curzon.[23]

The English Court of Appeals in another case ruled that Russian branch banks in Western nations ceased to exist legally as corporate personalities when the Soviets nationalized all banking houses in Russia. In The Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse,[24] Mr. Justice Sankey ruled that a Russian banking firm in London was no longer a legal identity and had no right to sue in English courts. The principle behind the decision was that legal personality depends upon the laws of the place where it was incorporated; the state that can create corporations can also destroy them.

The above interpretation was reaffirmed in Banque Internationale de Commerce de Petrograd v. Goukassow,[25] which involved a suit against an Englishman by the Paris branch of a Russian bank for the recovery of a debt contracted in France. In this case, the Court barred the suit because the plaintiff was not a personality in the eyes of English courts. Lord Scrutton wrote, "If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person." Lord Atkin took exception with this interpretation. He asserted that it was the law of the forum, the place where the

court sat, that determined legal personality, not the law of the corporate domicile.

The House of Lords took Lord Atkin's point of view when it reversed the Court of Appeals in the Mulhouse case. The Law Lords decided that the Soviet confiscatory decrees did not dissolve the Russian companies, but only provided for seizing their assets inside Russia. This decision became the judicial pole-star for several cases throughout the 1920's.[26]

French courts also refused to extend comity to Soviet laws that conflicted with French laws regarding property and property rights in France. They refused to acknowledge the legal existence of Russian banks in France, but with one great exception. The French courts granted Russian firms a de facto domicile in France in situations where Russian corporate funds were deposited with French business firms and banks. In other words, if a pre-1917 Russian corporation had financial affairs with French companies in France, it could sue as a legal person in French courts. A Russian firm located in London, for example, could not sue in French courts for a contract made outside of France.[27]

Even after recognition of the Soviet government by France, the French courts refused to award Russian private property in France to Soviet authorities. Most of the pre-Revolution Russian corporate interests were turned over to a government-appointed trustee. In 1925 the Soviet Ambassador sued the administrator of one such Russian firm for the corporate assets. The court ruled in favor of the trustee, allowing him to liquidate the company for the benefit of its former stockholders (many of whom were probably White Russians in Paris). The appeal of the Soviet Ambassador was rejected at the intermediate level and again at the court of last resort.[28]

A case in 1930 further empowered the administrator of a Russian firm to collect debts owed to it by French companies. The administrator sued two financial institutions for over a million francs which they refused to surrender because they had lost over seven and a half million francs by Soviet confiscations of their property in Russia. The court ruled that the funds be turned over to the administrator in order that they be applied equitably to all French claims against the Soviet Union.[29]

In both Germany and Switzerland, courts ruled that Soviet nationalization of banks and industries had ended their corporate existence in those nations as well as in Russia. In these two countries, the emigre Russian stockholders and corporate directors could not sue German or Swiss firms to

sue and recover claims against Swedes.[30]

Many legal complications probably could have been avoided in the United States if the Department of State had wished to freeze all Russian assets in America until recognition of Soviet Russia and settlement of the debt question. Yet this policy was not possible as long as it officially recognized the Provisional Government, rather than recognizing no government at all for Russia. In the light of the State Department's policy, the New York courts chose to follow the English precedents in Russian corporate cases. For ten years, Russian emigres sued to recover Russian business assets in the United States with consistent success.

New York Court Cases, 1924-1934

In 1924 the New York Court of Appeals followed the English Mulhouse precedent in Sokoloff v. National City Bank.[31] Boris N. Sokoloff had made a deposit with the National City Bank in New York in order to open an account with that bank's branch in Petrograd. After the Bolshevik Revolution, Sokoloff demanded payment of the account in dollars at New York City. The bank refused, claiming that when the Soviet government confiscated its branches in Russia it acquired all the bank's liabilities as well as assets. The unanimous decision of the Court of Appeals in favor of Sokoloff was written by Benjamin N. Cardozo, who would deliver most of the Court of Appeals' judgments in the Russian corporate cases until his appointment to the Supreme Court in 1932. He based his opinion on the fact that the Soviet government was not recognized by the United States; thus in the eyes of Americans the confiscatory acts of the RSFSR had no greater legal authority than the robbery of common bandits. Cardozo further remarked that Sokoloff had made a contract with a New York firm in New York, under New York law that could not have been affected by Soviet law. In conclusion, he offered an idea that would cause much trouble in the future: "The intangible chose in action [Sokoloff's right to sue for recovery], at least when it is the result of a deposit in a bank, has for some purposes a situs [legal location] at the residence or place of business of the debtor [National City Bank], though the creditor be far away...."[32]

The Sokoloff case actually decided that the plaintiff did have a chose in action; i.e., his legal right to sue for the recovery of his deposit in New York courts. The Court of Appeals did not order the recovery of Sokoloff's deposit, or recovery in pre-1918 rubles. In the denial to re-argue

the case, Cardozo assumed that recovery would be in the value of rubles, but he did not say whether that would be 1917 rubles or 1924 rubles. In terms of the latter, the debt would be worthless because of the runaway inflation that had swept Russia from 1918 to 1924.[33]

Two months after deciding the Sokoloff case, the Court of Appeals rendered its judgment in James v. Second Russian Insurance Co.[34] This case, like the earlier one, decided only questions of procedure and not of substance. Cardozo delivered the unanimous opinion of the Court again. He reviewed the facts of the case: The Fred S. James & Company was an American firm which had received an assignment from the Eagle, Star & British Dominions Insurance Company, Ltd. (an English firm) of a claim against the Second Russian Insurance Company. Cardozo concluded that the Russian company still existed as a legal personality in the eyes of New York law, since the Soviet confiscatory decrees were not applicable in the New York courts. As long as the Second Russian Insurance Company existed in New York, its funds were liable to claims against it, even if the claims were of foreign origin.

In February 1925 the Court reached a similar decision in Russian Reinsurance Co. v. Stoddard.[35] This was a 4-1 decision delivered by Judge Irving Lehman (Judge Crane dissenting, Judges Chester McLaughlin and William Andrews not participating, and Cardozo in the majority). The plaintiffs were the remaining directors of the Petrograd Insurance Company who were living in Paris. They wanted to recover from Frnacis R. Stoddard, the New York Superintendent of Insurance, the sum the company had deposited with him according to New York law when it began business in New York in 1906. The question at hand was whether the directors had a right to represent the corporation in New York courts since the insurance company had been dissolved in its homeland. Lehman observed that since the United States did not recognize the RSFSR, the laws that governed the operation of the company should technically be the laws of Imperial Russia. Yet he believed that this proposition was both absurd and unnecessary. He reasoned that as long as the State Department refused to recognize Soviet Russia the New York courts could judge cases according to the public policy of that state. In order to escape a judicial dilemma, Lehman concluded that the Court had to disclaim jurisdiction in this type of equity case until after recognition of Moscow by the United States. This would protect the Bankers Trust Company, that held the Russian assets in trust, from double jeopardy.[36]

Within the next five months the Court of Appeals rendered two more important decisions affecting Russian corporate assets in New York. It ruled in one that the First Russian Insurance Company still existed as a legal identity and its directors were empowered to act for it against the state Superintendent of Insurance.[37] It decided in the second that obligations contracted by New York firms with Russian businesses were not abrogated by Soviet laws. This was another suit against the National City Bank for dollar deposits made by a Russian joint stock company in New York. The court ruled that the contract had been made in New York and was therefore governed by New York law, not Soviet.[38]

These decisions by the Court of Appeals cases threatened several of the large American insurance companies with honoring policies contracted in Russia, even though the Soviet government had expropriated all of their assets in Russia. The companies feared heavy losses if the courts ordered them to honor pre-1917 Russian policies while the Soviet government refused to refund their assets in the Soviet Union. In 1926 the New York legislature, under heavy pressure from the insurance lobby, passed a stay law on all insurance contracts made by New York firms with Russian citizens until thirty days after American recognition of the Soviet Union. It was not long until the Court of Appeals heard an appeal in a case that was a showdown between private Russian interests and American business interests.[39]

Henry F. Sliosberg was a Russian subject who had bought a twenty-year life insurance policy from the New York Life Insurance Company for 20,000 rubles. The policy was delivered to Sliosberg in St. Petersburg on November 1, 1901, and the endowment policy was payable there in rubles. Sliosberg paid premiums until October 18, 1918. In the meanwhile, the revolutionary Soviets nationalized all insurance firms in Russia on December 1, 1917. Two years later, the Soviet government cancelled all life insurance contracts. The New York Life Insurance Company lost all of its assets in Russia, and it assumed that it also lost all liability to Russians under the new socialist laws. But Sliosberg escaped from Russia in 1920 and resided in Paris. In the spring of 1925 he came to New York City in order to file suit against New York Life to recover 16,140 rubles (over $4,000 in pre-1917 rubles).[40]

Sliosberg v. New York Life Insurance Company brought an impressive array of corporate lawyers into court. For the defendant, there were former Secretary of State Charles Evans Hughes and a future Secretary of State, John Foster

Dulles. John W. Davis, the 1924 Democratic Presidential candidate and famous Wall Street lawyer, appeared as amicus curiae for the Equitable Life Assurance Society. Hughes' principal argument was that the 1926 stay law prohibited his client from paying its obligation to Sliosberg until after outstanding diplomatic questions were settled by American recognition of the Soviet regime. He asserted that "A stay law which is reasonable as a conservatory measure is not unconstitutional." Sliosberg's attorneys repeated the argument that had won them the case in lower courts: the stay law was unconstitutional because it violated the sacred obligation of contract. Cardozo was now Chief Judge of the Court of Appeals, but he did not choose to write the opinion himself. Judge Henry T. Kellogg, who had just joined the court, delivered the unanimous opinion of the court. The court decided that the 1926 stay law was unconstitutional and Sliosberg's claim was a valid one. Whether or not Sliosberg was an alien was immaterial, Kellogg contended, because the defendant was a New York corporation bound by New York law, the contract was drafted in New York (although effective in Russia), and New York courts were the proper place for this type of legal action. He concluded that there was no justification for the New York stay law, and that the Court would never recognize the legitimacy of Soviet laws which would infringe property rights in New York.[41]

Between 1927 and 1930 there were two important federal cases that concerned the legal rights of Russians in the United States. The first was Lehigh Valley Railway v. State of Russia, which was heard in Second Circuit Court of Appeals in 1927. Judge Martin T. Manton rejected the idea that federal courts could distinguish between de facto and de jure governments, since they must follow the foreign policy of the national government. This case determined that Serge Ughet was the official representative of the Russian state in the United States, and therefore had the right to sue in American courts in the interest of Russia.[42]

The second case involved a suit by the Banque de France against the Equitable Trust Company of New York in 1929. The year before the Equitable Trust and the Chase National Bank had accepted a shipment of $5,210,000 worth of Soviet gold to be used for Soviet-American trade. The Banque of France filed a claim on this gold in order to recover its confiscated assets in Soviet Russia. Judge Henry W. Goddard wrote for the Circuit court that Soviet Russia was a de facto government, but that fact itself was not a question for adjudication since it was a political question determined by the political branches

of the national government. In the matter at hand, Goddard observed that France had recognized the Soviet Union. That act had validated all Soviet laws as they concerned Frenchmen, but not Americans. Therefore, the Banque de France had no legal claim to Soviet accounts with American firms as means of restitution for losses suffered in Russia, but must go through the diplomatic channels of its own government for relief. Even though the American firms had won their case, they decided that it was safer to return the gold to the Soviets, which they did.[43]

In 1930 the New York Court of Appeals reversed its earlier rulings and gave Russian corporate directors the right to recover their assets in that state. The case was Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank,[44] decided on February 11, 1930. The plaintiff was a Russian-chartered bank which had deposits in various cities in the West. It had made two deposits with the National City Bank of New York amounting to $66,749.45. In 1925 when the suit was initiated, six of the seven directors of the bank in 1917 were alive and living in Paris. By 1930, only three of them were alive. The National City Bank refused to honor its debt to the directors, because it claimed that the Petrogradsky Bank was no longer a legal personality and that its directors had no right to govern for the institution. In a 5-2 decision, Chief Judge Cardozo rejected the National City Bank's defense and ruled in favor of the Paris directors. "The personality created by law may continue unimpaired until law rather than might shall declare it at an end," he wrote. Apparently, Cardozo did not believe that the Soviet nationalization decrees were "law." At least, they were not law in New York. Cardozo reasoned in a lengthy opinion that contained much obiter dicta and few legal citations that the Petrograd Bank was still a legal personality and its directors did have the power to act in its behalf. The judgment of the Court was that the National City Bank owed the plaintiff directors $66,749.45 plus interest from 1920.[45]

Meanwhile, the New York courts had acted to settle the matter of the Russian insurance company assets. In August 1925 the New York Supreme Court ordered the State Superintendent of Insurance to take possession of various securities placed in trust by several Russian insurance companies which was required by New York insurance laws. The Superintendent of Insurance took over these assets in order to satisfy all claims against the insurance companies

by New York residents. After these claims were paid, there was a sizeable amount left over, and foreign claimants appeared in court to press their claims. The lead case in the disposition of these funds came in Matter of People (First Russian Insurance Co.) in 1930.[46] Cardozo delivered the opinion of the Court that the Superintendent must honor the claim of Fred S. James & Company, the American firm that had received a claim from a British firm by assignment and had sued for it in the 1925 case cited above. The question remained, however, what was to be done with insurance assets after all policy claims, domestic and foreign, were satisfied. The amount involved was about six million dollars including interest, and the beneficiaries might be Russian emigres who were stockholders in these companies in Russia. Less than a month after the case reported above, the New York Supreme Court ruled that the surplus assets were not to be distributed, but to be held by the Superintendent of Insurance until after American recognition of the Soviet Union. In the meantime, the court placed an injunction on all suits for recovery.[47]

In eight consecutive cases, all argued on January 5, 1931, and decided on February 10, the Court of Appeals reversed the lower court's orders and settled some matters of detail. In Matter of People (Russian Reinsurance Co.) and Matter of People (First Russian Insurance Co.),[48] Cardozo, delivering the unanimous judgment of the Court, distinguished by name the Stoddard case and followed the Petrogradsky M. K. Bank case. The Chief Judge reasoned that it would be unjust to satisfy domestic claims and not foreign ones. He therefore raised the injunction that barred foreign claimants from suing in New York courts. Any surplus after satisfaction of these claims would be turned over to the surviving directors of the insurance corporations. Cardozo took notice that in the case of the Russian Reinsurance Company, the directors controlled 8,000 out of 12,000 shares, and the directors of the First Russian Insurance Company had only 3,700 out of 10,000 shares. But he talked as though the outstanding shares belonged to Russian citizens who could not sue in American courts because of their government. He never conceded the fact that those shares could belong to the Soviet government itself by expropriation of private holdings.

In the six other cases, the Court made equally unreasonable decisions. One concerned the amount of interest that should be paid to a claim by the company liquidator.[49] Another allowed submission of proof of claim based on foreign business transactions into New York courts.[50] A third ruling ordered that claims in rubles should be satisfied at the rate of one ruble equalling $.51.[51]

This was a judicial misrepresentation of the facts, since the Court demanded that the claimant received equal value for the contract when it was made before World War I, ignoring the great inflation afterwards. The value of the ruble in the third quarter of 1914 ranged from $.52 to $.51, but by the end of 1917 it had fallen to $.12.[52] Yet in current Soviet money, this policy would have been worthless. In two cases decided together, that of the Northern Insurance Company and the Moscow Fire Insurance Company, respectively, could recover their company assets if they would post a bond to insure proper use of the funds. Otherwise, the directors were to put the assets in a trust company to be controlled by the courts.[53] In the last case, the court found that the Second Russian Insurance Company was insolvent, having four times as many claims as assets, so the available funds would be put into a trust company for safekeeping.[54]

In 1932 President Herbert Hoover appointed Cardozo as an Associate Justice of the United States Supreme Court, and his place as Chief Judge in New York was taken by Cuthbert W. Pound. The position of the Court of Appeals on the Russian cases, however, did not change. In 1933, four months before the Roosevelt-Litvinov Accords, the New York superior court upheld the right of Standard Oil Company to oil deposits in Russia based on a Soviet concession. The facts of the case were similar to Luther v. Sogar and the Wulfson case. At the intermediate level, the New York Supreme Court observed that the laws of the RSFSR were binding in Russia, although not beyond its borders. The consequence of not giving extra-territorial effect to Soviet decrees, the court observed, "has been that corporations non-existent in Soviet Russia in Soviet Russia have been, like fugitive ghosts endowed with extra-territorial immortality, recognized as existing outside its boundaries.... To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country is to give to fictions an air of reality which they do not deserve."[55] Chief Judge Pound, delivering the unanimous opionion of the Court of Appeals, agreed. The M. Salimoff & Company could not sue in this court to recover property losses suffered inside Russia, since New York courts had no right to judge the acts of a foreign government in its own territory, be it de facto or de jure.[56]

On the other hand, the superior court did not accept the lower court's analogy of Russian corporations in New York as "fugitive ghosts endowed with

extra-territorial immortality." If the Court of Appeals had based its judgments on recognition alone, it would have been obliged to give all Soviet laws effect in New York after American recognition in November 1933. Yet it had on several occasions remarked that it would never honor foreign laws that were contrary to the public policy of the state. This doctrine was reaffirmed in a case decided three months after the Roosevelt-Litvinov Accords. The Vladikavkazski Railway Company sued the New York Trust Company for recovery of a deposit of $46,584.18 made in its behalf by the Imperial Russian Government. The case at hand concerned particular motions that had been stricken by the lower courts in the litigation of the claim. Judge Irving G. Hubbs reiterated the Court's position that the Salimoff case applied only to property located in Russia, and it did not affect Russian property in New York. The basis for the Court's continued rejection to enforce Soviet confiscatory laws was the lack of comity. The Court found that the Soviet expropriations were "contrary to our public policy and shocking to our sense of justice and equity." Hubbs continued, "That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts."[57]

It appeared that the Court of Appeals may have begun to change its views on the Russian cases in 1934. Indeed, the decisions of the 1920's seemed to have little relevance to the realities of the 1930's. In Doughety v. Equitable Life Assurance Society,[58] which involved the reversal of twenty-six cases from the lower court, Judge Frederick Crane (who had sat on the Court during the earliest cases) ruled that a contract made in Russia before the Bolshevik Revolution was worthless. While the Soviet laws were still repugnant to him personally, the Judge observed that "we at least must admit that other peoples can try the experiment [socialism] if they please." He also took notice that in 1924 the Soviet government had issued a new ruble standard where one new ruble equaled fifty billion old ones. Therefore, the plaintiffs could not recover full value on insurance policies contracted in rubles that matured after March 7, 1924. Judge Lehman concurred with the result, but he wrote a separate opinion differing with Crane's judicial concessions to Soviet rule. In no circumstances would he allow any Soviet law that abridged the obligation of contract to be effective in this court, although he had to acknowledge that inflation indeed had changed economically the real value of contracts.[59]

The slight shift in the Court of Appeals' reasoning was consistent with the adjustment of other Western courts to the diplomatic realities of the times. A 1933 English Chancery decision found that the Soviet reorganization of the Russian economy had terminated the legal existence of Russian firms abroad. The case involved the distribution of assets of a defunct Russian branch bank in London. But to concede that Soviet laws ended the bank's existence was not to say that the Soviet government had a legitimate claim to that bank's assets. The Chancery court ruled that all claims based on contracts negotiated in England would be governed by English law. Sir F. H. Maugham therefore dismissed the Soviet claim and ruled that English claims would be honored against the bank's remaining assets.[60]

Commentaries on Non-Recognition Cases

As could be expected, the New York and British cases reported above created much controversy among legal commentators. In 1925 a lawyer writing for the North Carolina Law Review observed that, according to the English precedents, recognition alone was the critical factor as to whether Western courts would give effect to Soviet laws.[61] Three years later, John G. Hervey, a political science instructor at the Wharton School of Finance and Commerce at the University of Pennsylvania, wrote that there had been a variety of reasons why Western courts had refused to honor Soviet laws when the political branch of government had not extended recognition. In the absence of political advice, the courts, in his opinion, had relied on the doctrine of non-recognition too heavily. Hervey believed that American courts should give effect to the acts of de facto governments whenever justice required it, as long as enforcement was not contrary to the laws of the forum. The basis of this legal doctrine would free the judicial branches from the political policies of the national government, because the courts could continue to invalidate Soviet decrees even after recognition.[62]

Hervey's opinions were adapted by Yale Law Professor Edwin Borchard in a 1932 article for the American Journal of International Law, of which Borchard was an editor. The distinguished international law expert bemoaned the legal confusions over de facto and de jure recognition that had resulted from Wilson's foreign policy. He was particularly upset with the state of Russian affairs: the Department of State recognized the representative of a non-existent government, while it allowed representatives of a non-recognized government to do business in the United States, even though the latter technically had no legal

rights. Borchard strongly urged the courts to free themselves from the legal quagmire that resulted from unorthodox diplomatic policies and judge the laws of foreign governments according to the legal standards of the forum. In other words, Borchard was advocating that the courts should decide what they liked and disliked rather than leaving that evaluation to the State Department.[63]

An excellent study by George Nebolsine for the Yale Law Journal in June 1930 supplied the Hervey-Borchard thesis with a wealth of information. Nebolsine categorized Western decisions about Russian property into four approaches. First, there were courts that had rejected the effect of Soviet laws because of diplomatic non-recognition. Secondly, there were courts in countries that had recognized the Soviet Union, but had interpreted Soviet law in such a way as not to give it an extra-territorial effect. In the third category, some courts had given some Russian firms a de facto domicile outside of Russia, as the French courts had done. And lastly, there were those which had ruled that the forum determined what laws applied to the governance of corporations and not the laws of the state of incorporation. Nebolsine pointed out how the New York Court of Appeals had shifted from the first to the fourth approach. In conclusion, he gave much praise to Cardozo for evoking the law of the forum doctrine.[64]

To what degree these journal articles influenced the judges of the Court of Appeals would be very difficult to determine. It is true that the Court held weak premises to refuse to acknowledge the legal existence of the Soviet Union only because of American diplomatic non-recognition. As one commentator at the time pointed out, recognition does not create a state or a government in the international system, but only establishes diplomatic intercourse.[65] Professor Louis L. Jaffe of Harvard was very critical of the Court of Appeals because it refused to allow the Soviet government legal rights which it had earned by political survival in a hostile world environment.[66] To base decisions on conflict of laws, however, was a different matter. Here the courts exercised the initiative in judging cases rather than submitting to the political branches which conducted political policy. It would not be until the Belmont decision by the Supreme Court in 1937 that the conflict of laws approach also bowed to the national government's interpretation of international relations.

Conclusions

In summary, these New York cases involving Russian corporate assets after the Bolshevik Revolution were important in respect to the legal nuances of the

American non-recognition policy toward the Soviet Union. They illustrate the judicial frame of mind preceding the Roosevelt-Litvinov Accords, and they were the precedents upon which later cases were litigated after the Justice Department entered the court battles in 1934. Three specific things should be noted in regard to these cases. First, during the 1920's the American courts followed the well-established doctrine that foreign policy was the responsibility of the political branches of government and the judicial branch was bound by the larger value decisions of the Executive branch. During this decade, the New York Court of Appeals made its judgments consistent with the State Department's foreign policy. It gave no legal benefits to the Soviet Union which the State Department chose to deny Moscow, the Department acting in retaliation for repudiation of Russian debts and Soviet international revolutionary activities. The second point is that the Court of Appeals did not change its outlook on the Russian situation when the Roosevelt Administration changed the national policy in 1933. It refused to grant comity to the laws of the Soviet system. It continued its enmity to the Russian socialist experiment despite the fact that President Roosevelt was trying to mitigate ideological differences in the face of bellicose fascism.

Finally, Cordozo and other members of the Court of Appeals may have had an exaggerated sense of protection for individual property rights. They consistently upheld foreign claims against the interests of larger American companies that had lost millions by Soviet confiscations. Why should formar Russian property claims in the West be more favored than the claims of American nationals? It is true that allowing the New York banks and insurance firms to keep Russian deposits to satisfy their own claims would have been unfair to other Americans having claims against the Soviet Union. The simplest solution would have been a federal court order demanded by the State Department to hold all Russian corporate assets in escrow until a diplomatic settlement could be reached with Moscow. This was a legal impossibility as long as the State Department continued the fiction that Bakmetyeff and Ughet represented the Russian state. They actually represented nothing but their own interests and those of exiled Russians who opposed the Soviet dictatorship. The other solution was that the New York courts could have held Russian assets in trust. This they did do for the Russian insurance companies, but only because they ceased to function after 1925.

References for Chapter II

[1]See George Fischer, ed., Russian Emigre Politics (New York, 1951), pp. 35-50.

[2]Rose v. Himley, 4 Cranch 241 (1808).

[3]Gelston v Hoyt, 3 Wheaton 246 (1818), p 324. Also see United States v. Palmer, 3 Wheaton 610 (1818).

[4]Foster v Neilson, 2 Peters 253 (1829), p 307.

[5]Williams v Suffolk Ins. Co., 13 Peters 415 (1839); Doe v. Braden, 16 Howard 635 (1853).

[6]Kennett v Chambers, 14 Howard 38 (1852).

[7]Texas v White, 7 Wallace 700 (1869).

[8]Williams v Bruffy, 96 U.S. 176 (1877). Also see Thorington v Smith, 8 Wallace 1 (1869).

[9]Jones v United States, 137 U.S. 202 (1890), p 212.

[10]Underhill v Hernandez, 168 U.S. 250 (1897). That American claims against foreign governments was a diplomatic, not judicial, question was established in United States v Drekelman, 92 U.S. 520 (1875).

[11]246 U.S. 297 (1918), and 246 U.S. 304 (1918), respectively. Both cases were heard on January 3, 1918, and decided on March 11.

[12]Oetjen v Central Leather, pp 302-303.

[13]Ibid., p 304.

[14]The Rogdai, 278 Fed. 294 (1920) and 279 Fed. 130 (1920); The Penza, 277 Fed. 91 (1921).

[15]Russian Government v Lehigh Valley Railroad, 293 Fed. 133 (1919).

[16]Louis Connick, "The Effects of Soviet Decrees in American Courts," 34 Yale Law Journal 499 (1925), pp 503-504. This journal will hereafter be cited as Yale L.J. Serge Ughet, the Russian Financial Attache, succeeded to Bakhmetyeff's legal rights after the Ambassador resigned in 1923. See In the Matter of the Lehigh Valley RR, 265 U.S. 573.

[17]Wulfson v Russian Socialist Federated Soviet Republic (RSFSR), 234 N.Y. 372 (1923); Judge Frederick E. Crane dissented.

[18] RSFSR v Cibrario, 235 N.Y. 255 (1923); quote on p 263.

[19] Bishop, Roosevelt-Litvinov Agreements, pp 193-94. Also see Louis J. Jaffe, Judicial Aspects of Foreign Relations (Cambridge, 1933), pp 150-56; Edwin D. Dickinson, "Recent Recongition Cases," 19 American Journal of International Law 263 (1925). This journal will hereafter be cited as Am. J.I.L.

[20] Luther v Sagor [1921] 1 King's Bench 456, reversed by Court of Appeal, [1921] 3 K.B. 532.

[21] Luther v Sagor [1921] 3 K.B. 532, pp 539-47. The American citations were Williams v Bruffy, 96 U.S. 176 (1877), and Underhill v Hernandez, 168 U.S. 250 (1897).

[22] Ibid., pp 547-52. Warrington cited Williams v Bruffy, and Oetjen v Central Leather Co., 268 U.S. 297 (1918).

[23] Ibid., pp 552-59, quote on p 559. For an analysis of this case, see Norman Bentwich, "The Soviet Government and Russian Property in Foreign Countries," British Year Book of International Law, 1924, pp 78-88.

[24] [1923] 2 K.B. 230.

[25] [1923] 2 K.B. 682.

[26] Bentwich, "Soviet Government and Russian Property," pp 80-83. Dickinson, "Recent Recognition Cases," p 268; George Nebolsine, "The Recovery of the Foreign Assets of Nationalized Russian Corporations," 39 Yale L.J., 1130 (1930), pp 1139-41. Also see Lazard Brothers and Company v Midland Bank, Ltd. [1933] A.C. 289 (House of Lords).

[27] Nebolsine, "Recovery of Foreign Assets," pp 1142-44.

[28] Etat Russe v Ropit (1925) 52 Journal du Droit International 391. Hereafter, this journal will be cited as Clunet. See Andre-Prudhomme, et al., "La Revolution bolshevique et le statut juridique des Russes," 51 Clunet 5 (1924), pp 5-62, and Nebolsine, "Recovery of Foreign Assets," pp 1157-59.

[29] Joudon v Societe de Industri Chemique et Societe Generale, 57 Clunet 675 (1930).

[30] Nebolsine, "Recovery of Foreign Assets," pp 1144-46.

[31] 239 N.Y. 158 (1924).

[32] Ibid., pp 164-69; quote on p 169.

[33] Sokoloff v National City Bank, Motion for Re-Argument, 239 N.Y. 171 (1924).

[34] 239 N.Y. 248 (1925).

[35] 240 N.Y. 149 (1925).

[36] Ibid. For Lehman's decision, see pp 153-69; for Crane's dissent, see pp 169-70.

[37] First Russian Insurance Co. v Beha, 240 N.Y. 601 (1925).

[38] Joint Stock Company of Volgakama Oil and Chemical Factory v National City Bank, 240 N.Y. 368 (1925).

[39] See Joseph Pollard, Mr. Justice Cardozo (New York, 1935), pp 275-77.

[40] These facts appear in Sliosberg v New York Life Insurance Co., 244 N.Y. 482 (1927).

[41] Ibid., pp 487-99.

[42] Lehigh Valley Railway v State of Russia, 21 F. (2d) 406 (1927).

[43] Banque de France v Equitable Trust Co. of New York, 33 F. (2d) 202 (1929); Mikhail V. Condoide, The Soviet Financial System (Columbus, 1951), p 124.

[44] 253 N.Y. 23 (1930).

[45] Ibid.; Cardozo's opinion, pp 26-40; quote on p 30.

[46] 253 N.Y. 365 (1930).

[47] 229 App. Div. 637 (1930); New York Times, May 30, 1930, p 29.

[48] 255 N.Y. 415 (1931).

[49] Matter of People (Second Russian Insurance Co.), 255 N.Y. 412 (1931).

[50] Matter of People (First Russian Insurance Co.), 255 N.Y. 440 (1931).

[51] Matter of People (First Russian Insurance Co.), 255 N.Y. 428 (1931).

[52] Pasvolsky and Moulton, Russian Debts, p 42.

[53] Matter of People (Northern Insurance Co.) and Matter of People (Moscow Fire Insurance Co.), 255 N.Y. 433 (1931).

[54] Matter of People (Second Russian Insurance Co.), 255 N.Y. 436 (1931).

[55]Salimoff v Standard Oil Company of New York, 237 App. Div. 676 (1933).

[56]Salimoff v Standard Oil Company of New York, 262 N.Y. 220 (1933).

[57]Vadikavkazski Railway Co. v New York Trust Co., 263 N.Y. 369 (1934); quotes on pp 225-26 and p 227.

[58]266 N.Y. 71 (1934).

[59]Ibid.; Crane's opinion, pp 77-100; quote on p 83; Lehman's opinion, pp 105-14.

[60]In re Russian Bank for Foreign Trade, [1933] Ch. 745.

[61]John Paul Trotter, "Extraterritorial Operation and Effect of Confiscatory Decrees of the Soviet Government," 3 North Carolina Law Review 88 (1925); also see Paul Wohl, "The Nationalization of Joint Stock Banking Corporations in Soviet Russia and its Bearing on their Legal Status Abroad," 75 University of Pennsylvania Law Review 385, 527, 622 (1927).

[62]John G. Hervey, The Legal Effects of Recognition in International Law as Interpreted by the Courts of the United States (Philadelphia, 1928), pp 139-55, 156-60.

[63]Edwin Borchard, "The Unrecognized Government in American Courts," 26 Am. J.I.L. 261 (1932).

[64]Nebolsine, "Recovery of Foreign Assets," pp 1137-39, 1160-62.

[65]Osmond K. Fraenkel, "The Juristic Status of Foreign States, Their Property and Their Acts," 25 Columbia Law Review 544 (1925), p 545.

[66]Jaffe, Judicial Aspects of Foreign Relations, pp 79-236.

CHAPTER III
THE LITVINOV ASSIGNMENT CASES

On September 17, 1934, Attorney General Cummings reported to Secretary of State Hull that he interpreted the Litvinov Assignment to include both Russian state assets and former Russian private property in the United States. Whether that had been the original intent of FDR and Litvinov ten months before is not at all certain; but from the autumn of 1934 on, the Justice Department asserted that the Litvinov Assignment should mean that the United States had claim to all pre-1917 Russian assets in this country. The recovery of old Russian state assets was relatively easy, but the claim to private Russian property was a legal question that would take eight years of litigation in federal courts. The Supreme Court cases on the Litvinov Assignment constituted a major chapter in the history of judicial review of American diplomacy, from which emerged the current legal interpretations of recognition, foreign confiscations of private property, and executive agreements.

Recovery of Russian State Property

The Justice Department had little difficulty in recovering those assets in the country that had belonged to the Russian state itself. On February 6, 1934, less than three months after the Roosevelt-Litvinov Accords, the Justice Department won the right to replace the "State of Russia" in a suit initiated by Serge Ughet against the National City Bank in 1928. At stake was a deposit of $115,788.32 made by the Russian government before the Bolshevik Revolution. The U.S. Attorney argued the government's claim as assignee of the Soviet government before the United States Circuit Court of Appeals for the Second Circuit. Judge Martin T. Manton, with the concurrence of Judges August Hand and Harrie Brigham Chase, ruled that the conduct of foreign relations was a political rather than a judicial matter and that the assignment had been made within the powers of the President to make such an executive agreement.[1] While this case involved only a chose in action (a right to sue for a claim) based on a fund once belonging to the Russian government and not involving private Russian corporate assets, the Circuit Court's decision seemed to indicate to the Justice Department that the courts would be sympathetic to its interpretation of the Litvinov Assignment.

The total amount of Russian state claims against American nationals, as listed by Ughet in his assignment of claims to the American government on August 25, 1933, was over eight million dollars. The largest single claim was of five

million dollars against the Guaranty Trust Company of New York for deposits made by Ughet in 1917, most of which was probably aid from the American government. The Justice Department began a suit for recovery of this deposit on September 21, 1934. It took nearly four years for the case to reach the Supreme Court, which eventually ruled against the government's claim on a legal technicality. The government did receive some Russian claims without a court battle, but only a small amount. By autumn of 1935, it had recovered less than $170,000. One of the amounts was $825.93 from the estate of August Belmont, Jr., an amount that Belmont had received from Ughet on behalf of the Provisional Government.[2] New York Bank & Trust Case.

The recovery of former Russian corporate property was a long and difficult judicial process. As explained in Chapter I, there is reason to believe that President Roosevelt and his advisors did not intend the Litvinov Assignment to include these as well as Russian state property. Or, perhaps there were people at the White House and State Department who were aware of the New York cases involving Russian assets, and were satisfied that the Litvinov Assignment was worded broadly enough that the government could wait to see whether it would be worth the trouble to press the Assignment in American courts.

It was Soviet Ambassador Troyanovsky who first approached the State Department for a clarification of exactly what the Litvinov Assignment meant in detail. Robert F. Kelley, the Chief of the Division of Eastern European Affairs, reported on February 21, 1934, a conversation with Troyanovsky in which the Assignment clauses were discussed. The Soviet Ambassador suggested that the paragraph with regard to Soviet waiver of claims was too broad, and Kelley agreed that that part of the Accords needed revision.[3] Troyanovsky complained to Secretary of State Hull in March about the results of a recent New York Court of Appeals case that refused to honor Soviet laws in relation to Russian interests in the United States. The case to which he referred was probably Vladikavkazski Railway Company v. New York Trust Company, which was decided on February 27, 1934. This was the first major case after the American recognition of Soviet Russia in which the Court of Appeals refused to give comity to Soviet property laws because they were in conflict with New York public policy. It was Troyanovsky's suggestion to Hull that the American government should intervene in the judicial handling of Russian property interest.[4]

The interesting thing to note here is that all through the 1920's Soviet agents in the West had not tried to claim for their government the property of

Russian companies outside of Russia. In his famous "Circular No. 42," dated April 12, 1922, Soviet Foreign Affairs Commissar Georges Chicherin instructed his diplomatic agents not to make legal claims to private Russian property abroad. At the end of the message, he concluded:

> Consequently, the structure of rights of property established by decrees issued by the Russian Soviet authorities, regulate but property relations within the territory of the R.S.F.S.R.
>
> Property rights pertaining to persons who do not reside within the territory of the R.S.F.S.R. and are not connected with the latter, cannot be ruled by Russian Law and are subject to local legislation, independently of the citizenship of persons interested therein, even if they happen to be Russian citizens.[5]

It is not known whether the circular was an honest legal appraisal by lawyers in the Commissariat of Foreign Affairs, or only a pragmatic diplomatic policy to prevent Soviet representatives from getting involved in Western judicial battles that might create bad public opinion toward Moscow. A case was mentioned in Chapter II in which the Soviet Ambassador to France prosecuted a claim against former private Russian property in 1925, with no success.[6]

This much is known: in the eyes of orthodox Communists, international law is a capitalistic tool to protect bourgeois society. Communists view it as merely a political technicality to be used in dealing with the West only to protect Soviet interests. There is no question that the Soviet confiscatory decrees intended to expropriate all the property that the Soviets could put their hands on. If Moscow did not claim nationalization of Russian property abroad, it was because it could not get to it. Since the Soviet government could not get Russian assets in New York City by its own authority, its assignment of them to the American government cost Moscow nothing and perhaps could pacify Washington as a token payment of war debts.[7]

In any event, the Department of Justice, in cooperation with the Treasury and State Departments, decided to prosecute the government's claim to Russian corporate property in New York by virtue of the Litvinov Assignment. The object of the first suit was the residue fund of the Moscow Fire Insurance Company, which the New York Bank & Trust Company was holding in trust for eventual distribution, pending the findings of a court-appointed referee. On August 13, 1934, U.S. Attorney Martin Conboy filed the government's claim with the referee. Only nine days later, Conboy filed suit against the New York Bank & Trust and requested a court injunction against any distribution of the fund pending litigation.

By October 1, 1934, the Justice Department had initiated seven suits involving over six and a half million dollars, with eight more, for over four million dollars, in preparation.[8]

The details of the New York Bank & Trust case, the first government suit to recover Russian business property to reach the United States Supreme Court, were very complicated. The case involved three suits handled together: against the New York Bank & Trust Company for $1,080,399.54 held in trust for the Moscow Fire Insurance Company; against the President and Directors of the Manhattan Company for $249,000 of the Northern Insurance Company of Moscow; and against the New York Superintendent of Insurance for about one million dollars of the First Russian Insurance Company. These Russian insurance companies had continued to do business in New York until 1925, even though their home offices had been nationalized in 1918. New York law required that every insurance firm doing business in the state had to deposit a security to cover policies with the State Superintendent of Insurance. In 1925 and 1926 the New York Supreme Court ordered the Superintendent to take legal custody of all Russian insurance company assets and hold them pending court order for distribution. By 1931, the Superintendent had satisfied all domestic claims and still had a sizable amount left. The Court of Appeals in the eight cases decided on January 5, 1931, had ruled that in the question of the Moscow Fire Insurance and Northern Insurance, for which there were only one and two surviving directors, respectively, the funds could be placed in a trust company pending final liquidation. On April 18, 1933, the Superintendent, George S. Van Schaick, deposited the fund of Moscow Fire Insurance with the New York Bank & Trust Company. The very next day, Paul Lucke, the sole surviving director of this insurance company, sued in New York court for final distribution of it. The case was heard by a referee from October 1934 to August 1935. His report recommended the satisfaction of twenty-five non-Russian foreign claims and the distribution of $700,000 to 400 shareholders, most of whom were Russian emigres. The claim of the United States government was not included.[9]

Conboy filed the government complaint in the District Court for the Southern District of New York on August 22, 1934. Seven days later, the defendant moved to dismiss the Federal complaint on the grounds that it failed to state facts sufficient to constitute a case. Conboy's case was based on the Litvinov Assignment and the fact that American recognition of Soviet Russia had retroactively

validated Soviet laws since 1917, including confiscatory decrees. Conboy argued that the Litvinov Assignment included this fund, that it was a valid contract between the American and Soviet governments, and that the Soviet confiscatory decrees intended to cover Russian corporate assets abroad. The counsel for Paul Lucke was a well-known conservative New York attorney, Frederick B. Campbell, who was under indictment himself for his failure to turn in gold bullion in opposition to Roosevelt's economic policy. Judge Alfred C. Coxe heard the case on October 4 and 6, and rendered his opinion on November 28. He dismissed the government's suit, because he believed that the Soviet government had no legitimate right to the insurance corporation's assets under the law of New York and that the Litvinov Assignment had not included this type of claim.[10]

Conboy appealed the case to the Circuit Court of Appeals on December 22, 1934. Judges Manton, Chase, and August Hand (the same three who had decided in favor of government's rights by Litvinov Assignment on February 6, 1934) heard the case and rendered their judgment on May 20, 1935. The Circuit Court upheld Judge Coxe's ruling against the government by a 2-1 vote, Judge Manton dissenting. Judge Chase, rendering the judgment of the court, did not follow Coxe's reasons. He did not dispute the validity of the Litvinov Assignment, nor that of Soviet laws affecting property in this country. Whereas Coxe had dismissed the government's suit on substantive grounds, Chase dismissed it on procedural technicalities. He and Judge Hand believed that the government had to sue in the New York state courts for recovery, not in federal courts, because the suit was in rem (against a thing) which was in the original jurisdiction of the state courts.[11]

This decision would mean eventual disaster for the government's case. The Justice Department could not hope to win its argument in the New York Court of Appeals, which had taken such an uncompromising stand against giving any extra-territorial effect to Soviet confiscatory decrees. That was the whole point behind Conboy's pleading the case in a Federal court. Chase based his opinion on the judicial status of the United States as a plaintiff in a private capacity, as statutory successor to a corporation, once removed, rather than as the national policy, which would entitle it to sue in its own courts.

It was precisely on this point that Judge Manton wrote a lengthy dissent, over twice as long as Chase's opinion. He insisted that the American government acted as a sovereign in everything it did, particularly in foreign relations where it shared power with no other level of government. Manton emphasized that

recognition was an Executive political act which was both retroactive in its legal effect and binding on the courts. He also maintained that an executive agreement stating the conditions of recognition was likewise binding on the courts. In other words, as of November 16, 1933, the Soviet government became the legal owner of the former Russian corporate assets in New York, not the courts of New York. When the Soviet government assigned this right to the American government, the latter succeeded to a sovereign right, and the New York courts had no responsibility except as custodian for the United States. Manton rejected the argument that Soviet confiscations were against the public policy of New York; New York had no "public policy" in foreign affairs. The national "public policy" in diplomatic relations was determined only by the President.[12]

The State Department was rather nonplused over the entire judicial process. In a note to Assistant Secretary of State Walton Moore, a legal expert in the department, Eastern European Affairs Chief Robert Kelley urged that the suits be dropped because he did not like the argument that Soviet laws could have extra-territorial effect in the United States.[13] Hull, however, informed Attorney General Cummings on December 15, 1934, that the State Department agreed with the Treasury Department: Conboy should appeal Judge Coxe's opinion to the Circuit Court.[14] In a similar note after the Circuit Court's judgment, Moore informed Cummings that it was up to the Justice and Treasury Departments to make the decision whether to appeal the case to the Supreme Court. Moore showed no interest in the case, as though the State Department were trying to disown a policy that had failed to produce results, a policy that it had not originated.[15]

The government had not yet decided what to do with the money it might recover from the Litvinov Assignment. One private suggestion made to President Roosevelt was that the suits should be dropped because the Soviets would deduct from their obligations any money the government recoverd in the United States.[16] But by spring 1935 it was obvious that the United States was not going to receive any debt payments from Moscow in the near future. Secretary of the Treasury Morgenthau wrote to Hull on May 4, 1935, suggesting that the President should announce that he would ask Congress to provide for the use of any recovered funds from the Litvinov Assignment to compensate private American claims against the Soviet Union.[17] Hull responded that he fully agreed that the government should not keep any assets it recovered, but rather apply them to the private American claims.[18] This was done by act of Congress in 1939.[19]

The Justice Department petitioned on July 1, 1935, for a writ of certiorari in order for the Supreme Court to review the Bank of New York & Trust Company case. The Justices granted the petition on October 14. The parties filed their briefs, and argued the case orally on December 18. Solicitor General Stanley F. Reed, with the assistance of David E. Hudson, Paul A. Sweeney, Henry Munroe, and other members of the special legal team from the Justice and Treasury Departments, presented the government's case. Reed's argument was basically the same as Conboy's at the lower levels: the Executive act of diplomatic recognition was legally retroactive, and thereby validated Soviet confiscatory laws, which included Russian corporate property in the United States, in the eyes of American courts. His central idea was that the state of Russia governed the life of its corporations; what it could incorporate it could also destroy. Furthermore, he asserted that the right to the Russian deposits in New York had always remained in Russia; therefore it was governed by Russian laws, not the laws of New York where the property was actually located. As for doctrines of public policy, Reed argued that the only public policy involved was the President's foreign policy, which demanded full judicial respect for the Soviet Union.[20]

Frederick B. Campbell handled the defense for the Bank of New York & Trust. He insisted that Soviet confiscatory decrees could not be honored in the United States, where such acts were forbidden by federal and state constitutions. He further argued that the courts had a responsibility to construct international agreements in order to protect the sanctity of private property. He concluded by restating Judge Chase's opinion that the proper jurisdiction for the case was in New York courts.[21] The brief for the Superintendent of Insurance largely repeated the assumptions made in Judge Coxe's decision. There were also briefs of amicus curiae filed in behalf of the National City Bank and the Guaranty Trust Company, which was represented by John W. Davis.

The decision of the Supreme Court handed down on January 6, 1936, was written by Chief Justice Charles Evans Hughes, who had been one of the chief architects of the policy of non-recognition of Soviet Russia as Secretary of State from 1921 to 1925 and who had become Chief Justice of the Supreme Court in 1930. Hughes reported the facts on the case at length, and then rendered a short opinion. Speaking for a unanimous Court, the Chief Justice agreed with Judge Chase's judgment that the United States must plead its case in New York courts because of their original jurisdiction over the matter. He added the observation that Chase had also made, that if the government could not win its case in New York

courts, it could still appeal to the Supreme Court for final judgment. The Chief Justice made no comments on the merits of the case.[22]

The Belmont Case: Preliminaries

On Tuesday, June 18, 1935, Federal authorities in New York demanded $25,438.48 from the executors of the estate of the famous financier August Belmont, Jr. This sum was the account of the Petrograd Metal Works, a Russian metallurgical foundry that had been nationalized by the Soviet government in 1918. The Belmonts refused to surrender the deposit. Nine months later, U.S. Attorney Lemar Hardy served a complaint against them for recovery of the Metal Works fund. Thus began a court battle that would end with the Supreme Court's announcement of one of the broadest doctrines of governmental powers ever advanced in constitutional history.

The object of the government's suit was Morgan Belmont and his stepmother, Eleanor Robson Belmont, the widow of the late August Belmont, Jr. August Belmont, Jr. was the son of the wealthy financier August Belmont, Esq., who had been the Rothchild representative in New York from 1837 to 1890. Upon his father's death, the younger Belmont became the head of the prestigious Belmont Bank. The family also had been influential in Democratic politics since the elder Belmont had been the Democratic National Committee Chairman from 1860-1872. Eleanor Robson Belmont, however, had been a great admirer of Theodore Roosevelt, and she was a friend of his niece, Eleanor Roosevelt. It was coincidental that this test suit would be against a prominent Democratic family and one close to FDR's own wife.[23]

When August Belmont, Jr., died on December 10, 1924, his last will and testament provided ten million dollars in personal property and an equal amount in real property to his beneficiaries. He probably was much wealthier than his will indicated, and he may have turned over much of his wealth to his wife and sons before he died. In 1923, Belmont had changed his will in order to make Cornelius Wickersham, a prominent Wall Street attorney, an executor, but then he changed it again to include his son, Morgan. Wickersham would be the Belmont's attorney during the litigation of the government's suit against them. The banking firm itself had not been active for some time, and the will provided for its dissolution. Included in the estate were two deposits from Russia: $825.93 from the Russian government (which was turned over to the American government in 1935) and $25,438.48 from the Petrograd Metal Works, which had ceased to operate as a private corporation in Russia in 1918.[24]

There were good reasons why the Justice Department chose to attack the Belmont claim after the defeat of the New York Bank & Trust suit in the Supreme Court early in 1936. There was much more money involved in the suits for the defunct Russian insurance companies, but the suits were harder to win because of legal technicalities. The Russian insurance firms had operated for six to seven years after the Bolshevik Revolution under New York law. The Petrograd Metal Works, however, had never operated in the United States, so there was no question that its legal domicile was only in Russia. The New York Supreme Court had taken jurisdiction over the insurance assets in order to satisfy domestic, then later foreign, creditors. The Metal Works deposit had remained in the hands of the Belmonts; there were no domestic claims against it and the New York courts had taken no notice of it. Therefore, the case could be brought before the federal courts rather than the state courts. The insurance companies ceased to exist in Russia after Soviet expropriation, but the Metal Works continued to operate within the Soviet-managed economic system. In this case, there was no question that the Soviet government had succeeded to the management of the company and had assumed all rights that the former directors had had. Those included all assets that the company had, whether in Russia or in deposits in Western banks.

It was not until March 6, 1936, that Lamar Hardy served the government complaint in U.S. District Court, Southern District of New York, against Morgan Belmont and Eleanor Robson Belmont as executors of the Belmont estate. Hardy served an amended complaint on April 2 and a second amended complaint three weeks later. On April 29 Cornelius Wickersham, the eminent partner of the Wall Street firm of Cadwalader, Wickersham & Taft, who was the Belmont's attorney, served upon Hardy notice of motion to dismiss the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. On May 5, 1936, Hardy appeared in court for the United States, and Wickersham appeared in behalf of the Belmonts. The presiding Judge was the Hon. Murray Hulbert.[25]

Hardy's second amended complaint stated a series of facts to show the government's right to sue for the recovery of the fund. In legal terms, Hardy presented evidence for the government's chose in action to recover the res (the "thing," or the deposit of the Petrograd Metal Works in the hands of the Belmont estate executors). He stated the following facts: The Kompania Petrogradskago Metallicheskago Zavoda, or Petrograd Metal Works, was a corporation

organized under the laws of Russia in 1916 with a fixed capital of over a million rubles. On June 28, 1918, the Soviet government by decree nationalized this company along with all other metallurgical operations. On December 10, 1924, August Belmont, a "general partner" of August Belmont & Company, died. Nineteen days later the Surrogate's Court of Nassau County made Morgan and Eleanor Belmont executors of his estate, which included a deposit of $25,438.48 by the Petrograd Metal Works with the Belmont bank prior to 1918. On November 16, 1933, the Soviet government assigned its claims to property due it from American citizens to the American government; since the former had exclusive right to the deposit in question, the latter acquired it by assignment.[26]

To prove his assertions, Hardy included six documents as exhibits. One was a copy of the Soviet degree of June 28, 1918, and the second was a certified translation of it by the State Department. Section I read:

> The industrial and commercial enterprises enumerated below, which are located within the borders of the Soviet Republic, together with all their capital and property regardless of what the latter may consist, are declared the property of the Russian Socialist Federated Soviet Republic: ...

Part 9 of this section specified all iron and metal works with a capital of over a million rubles that were owned by joint stock companies. "Furthermore," Part 10 read, "not withstanding the extent of basic capital, all enterprises which produce any kind of metal-ware, constituting the sole production of wares worked from metal within the borders of the Russian Republic, are declared to be the property of the Republic;..." Sections III, IV, V, and VI dealt with the management of these nationalized industries. Although ownership had passed to the Soviets, the day-to-day affairs of the firms were to be conducted by the former owners and managers, who were responsible to the Soviets for continued production and protection of physical plants. Section VI provided that

> Personal funds belonging to members of the management, stockholders, and owners of nationalized enterprises shall be sequestered until the settlement of the question of the relationship of these funds to the circulating capital and the resources of the enterprise.[27]

Exhibit Three was a copy of the Litvinov Assignment of November 16, 1933. The last three documents were statements by Attorney General Cummings, Secretary of State Hull, and Acting Secretary of State William Phillips. Cummings' letter to Hull, dated September 17, 1934, expressed his official opinion that the Litvinov Assignment did include all former Russian corporate property in the United

States claimed by the Soviet government by nationalization decrees. Hull's return letter expressed his concurrence. Phillips' letter to Cummings, dated October 27, 1934, was probably the most accurate evaluation of the Assignment:

> When the notes were exchanged, it was not definitely known what assets in the United States might properly be regarded as belonging to the Soviet Government. The notes were intended to cover whatever assets that Government possessed or was entitled to recover in the United States.[28]

Wickersham presented two reasons why the government's complaint should be dismissed. He first questioned whether the wording of the Assignment itself included nationalized Russian corporate assets, since it did not expressly say so. Secondly, he asserted that extra-territorial effect of Soviet confiscatory decrees was in conflict with the public policy of property rights in New York, and therefore the court could not allow the government's claim based on Soviet laws. For precedents, Wickersham cited the Vladikavkazski case and the recently decided New York Bank & Trust case. Judge Hulbert granted the motion to dismiss the complaint. He did so, he explained, in order to expedite appeal to a higher court in order that it might judge the merits of the case not expounded in Chief Justice Hughes' opinion in the New York Bank & Trust case. Judge Hulbert allowed Hardy's appeal to the Circuit Court only a week later.[29]

The Belmont Case Before the Circuit Court

The Belmont case was argued before Circuit Court Judges Manton, August Hand, and Thomas W. Swan on June 16, 1936. Lamar Hardy represented the United States, with the assistance of David Hudson and Henry Munroe. Appearing for the defendants were Cornelius Wickersham and John W. Davis with the aid of two other attorneys. There were also attorneys present for the President and Directors of the Manhattan Company as amicus curiae, and Boris M. Komar, who had handled several of the Russian corporate cases before the New York Court of Appeals, as amicus curiae for the Day-Gormley Leather Company. All of the facts presented were the same as in the lower court, with one important exception. On June 8, 1936, the New York legislature passed an amendment to the Civil Practices Act, entitled Section 977b, that declared that property rights based on governmental confiscation without just compensation should not be honored in New York courts. In such a situation where a corporation having assets in New York had been nationalized or liquidated, any creditor or stockholder could apply to the State Supreme Court for the appointment of a receiver of those funds. A suit was quickly filed against the Petrograd Metal Works, so the state Supreme Court

appointed a receiver, John R. Crews, to take custody of the Metal Works deposit. When he went to the Belmonts to get the fund, he was rejected with no better luck than the government. By the time the Circuit Court rendered its decision, the case had become a good deal more complicated.

The Circuit Court handed down its decision on August 10. Judge Swan delivered the decision for himself and Judge August Hand. Judge Manton dissented on the same grounds that he had in the New York Bank & Trust case. Swan began by conceding that the Litvinov Assignment did intend to include the assets of former Russian business firms in the United States, as Secretary Hull and Attorney General Cummings had certified. Swan also alluded indirectly to Soviet Circular No. 42, but ruled that the court had no right to question the certified statements of Hull and Cummings. He also decided that the language of the Soviet decree of June 28, 1918, was broad enough to include the account of the Metal Works in New York. On the basis of those two facts, the government's claim might seem valid, except that the res was located in New York, and therefore New York laws must govern its disposition. "Laws of foreign governments," the Judge observed, "have extra-territorial effect only by comity and the public policy of the forum determines whether its courts will give effect to foreign legislation." New York's public policy was clearly stated in Court of Appeals decisions and Section 977b of the Civil Practice Act, all declaring confiscation against the policy of New York. The United States as assignee of the Soviet Union had no better claim to the res than the Soviet government. Swan also asserted that the question of status and situs were not part of the federal public policy, but that of the state where the res was located. Therefore, the government could assert its claim against the Petrograd Metal Works only after those made by the company's creditors and stockholders. The court affirmed the order to dismiss the case.[30]

There were several similarities between Judge Swan's opinion in the Belmont case and Judge Chase's in the New York Bank & Trust case fifteen months before. Both emphasized legal technicalities of title and situs of property rights rather than the diplomatic nature of the government's claim based on the Litvinov Assignment. This aspect of law is known as "conflict of laws," a situation when a court takes notice of a foreign law that governs its own citizens and property, or a right based on a foreign jurisdiction, or a similarity (at least in principles of justice) between the laws of two countries so that the courts of each enforce the laws of the other. Associate Justice Joseph Story had called this "private international law"; that is, the adjudication of

private freedoms and personal property on an international level, as opposed to the affairs of governments. Both Chase and Swan chose to decide the Litvinov Assignment cases under the rules of private international law rather than interpreting the Assignment as part of an international compact.

Judge Chase compared the United States to a corporation rather than a sovereign when he ruled that it had no greater right to the assets in question than the Soviet government as statutory successors of the corporations. This notion negated the whole Soviet concept of state-owned and state-managed industry: property wholly within the public domain. But the right that Moscow signed over to Washington was a sovereign right, not a corporate one, and was in the sphere of public rather than private international law. Judge Swan took the same approach. In effect he had attempted judicial review of Soviet nationalization laws. He could not undo what the Soviet government had done in Russia, but by dismissing the government's suit in the Belmont case he decided that the court would not apply Soviet laws to property situated in this country. Judge Swan rejected the idea that this case involved the national public policy: "If the public policy of the United States is material, it would seem clearly adverse to a claim based on the Russian decree. But in our opinion it is the policy of New York which this court is to apply. The question is whether the plaintiff's assignor had an enforcible right as successor to the Russian corporation after its nationalization. This is really a question of title [;] and state law, not federal law, governs the matter of title."[31] Such legal technicalities as "situs", "domicile", "comity", "law of the forum", and "public policy" were relevant only to private cases of conflict of laws, and had no bearing on international contracts of sovereigns.[32]

The logical way to escape the private international law argument relied upon by Judges Chase and Swan was to argue that an executive agreement, such as the Roosevelt-Litvinov Accords, had the same status as a treaty, in that it was a diplomatic contract concluded by sovereign powers and must therefore supersede all state laws. Such a proposition, however, was too bold and unprecedented for the times. The government attorneys never argued such a point, nor did Judge Manton ever assert it in his dissents.

Rather than writing another complicated dissertation on the issues, Manton simply referred to his dissent in the New York Bank & Trust case for the reasons for his dissent in this case. As it will be recalled, Manton based his opinion

on the idea that diplomatic recognition of a foreign government was a political act of national importance which should be binding on the courts. But he did not go so far as to insist that national foreign policy overrides state laws ipso facto. To say this he would have had to assert that the documents establishing diplomatic recognition constituted a national contract binding on the states; while he hinted at this thought, he did not express it explicitly. But the sentiment that state affairs must yield to foreign affairs was there:

> When, therefore, the Soviet Government was recognized, the courts lost all right to continue to inject their pre-recognition conceptions of public policy into the international panorama in manifest derogation of the express determination of the political department and the clear juridical implications of the act of recognition.[33]

A few words should be said about Circuit Court Judge Martin T. Manton. His passionate ambition was to sit on the United States Supreme Court, and he went to great lengths to win a nomination to it. In 1922 he had come very close to his goal. Certain members of the Harding Administration thought it would be politically expedient for the President to appoint to the Court a Catholic Democrat, which Manton was. There was great pressure on Harding to nominate him, but the man who blocked the appointment was Chief Justice William Howard Taft, who threw his considerable political weight against Manton. Taft called the New York Circuit Court Judge a "shrewd, cunning, political Judge," and "an utterly unfit man for our Court." The nomination eventually went to a conservative Catholic Democratic corporate lawyer from Minneapolis, Pierce Butler. Manton tried again in 1925, but failed due to the nomination of another New Yorker, Harlan Fiske Stone. During the New Deal, Manton was a partisan New Dealer on the bench in the hopes of winning Roosevelt's good will. In 1938, however, the law caught up with Manton's ambitions and greed. In that year a special Circuit Court found him guilty of conspiracy to fix cases for parties who invested money in his bogus business organization. Associate Justice Harlan Fiske Stone and retired Justice George Sutherland sat on the court that upheld his conviction.[34]

Whether Manton wrote his dissent in the Litvinov Assignment cases out of honest conviction or just to please Franklin Roosevelt is not certain.

The Diplomacy of the Belmont Case

Meanwhile, the State Department was busy trying to gather more evidence for the Justice Department to use in its appeal of the Belmont case to the Supreme

Court. On May 1, 1936, Hull wrote to the American Charge in Moscow, Loy Henderson, that the Department desired to get information from the Kremlin whether the Soviet decrees confiscating all assets of the dissolved Russian corporations did intend at the time to nationalize all assets irrespective of location.[35]

Four days later, the Secretary wrote the Charge that the Justice Department had requested that Ambassador Troyanovsky invite a Soviet legal expert to the United States to testify in the government's suits before the New York courts. Mark Ambramovich Plotkin, the Assistant Chief of the Judicial Department of the Foreign Affairs Commissariat, did come to America in a private capacity to testify on Soviet laws in the summer of 1936 and the winter of 1938-1939. When he was invited to come a third time, the State Department discovered that Plotkin had disappeared in the last of the Great Purges.[36]

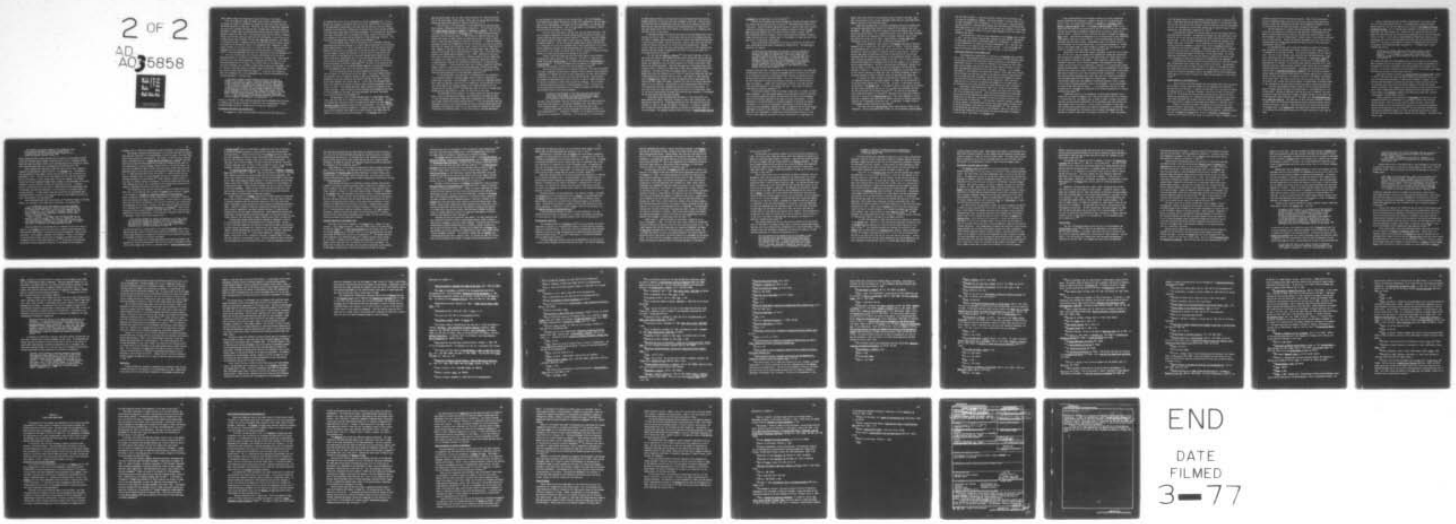
Troyanovsky cooperated with Hull by giving him a memorandum on July 21, 1936, that the 1933 agreement did include corporate assets nationalized by the Soviet government as well as strictly state claims. He interpreted the wording of the Litvinov Assignment to mean 'that his government assigned to the American government all claims that it had as successor to prior Russian governments, or "otherwise", "for instance, to pre-revolutionary organizations and companies which were nationalized in accordance with Soviet legislation." [37]

On September 1, 1936, Hull related another legal problem to Henderson. In the suit for recovery of the assets of the Moscow Fire Insurance Company, the defense raised the point that the company had been nationalized by the RSFSR but not by the Union of Soviet Socialist Republics (USSR).[38] This was a legal technicality that would have bothered only an American court. In the American federal system, there is a division of powers between the national and the state governments. It had been equal states in 1788 that had ratified the Constitution of the United States. American courts tended to think only in terms of the American model of federalism, which is an historical exception. In Europe, the historical rule was that one great state formed a nation by dominating sister states. Muscovy united Russia, Prussia united Germany, Piedmont dominated Italy, Isle de France became France, and England dominated Great Britain. In the Soviet system, the RSFSR was Russia proper while there were separate republics in the Ukraine, Bylo-russia, and Trans-caucasia. These republics formed the USSR in 1923. While these republics were officially sovereign and equal, there was one organization that dominated them alike: the Communist Party of the Soviet Union. Whether the Party acted through the RSFSR or any

AD-A035 858 AIR FORCE INST OF TECH WRIGHT-PATTERSON AFB OHIO F/G 5/4
AMERICAN DIPLOMACY BEFORE THE COURTS: JUDICIAL REVIEW OF SOVIET--ETC(U)
JAN 77 S M MILLETT

UNCLASSIFIED AFIT-TR-77-1 AU-1-77-AFIT/EN NL

2 OF 2
AD
A035858



END
DATE
FILMED
3-77

other republic made little substantive legal difference to the Kremlin.

Yet, to an American judge, the USSR, which Litvinov represented, could not assign the rights of the RSFSR, as though the former was to the latter as the United States was to New York. Therefore, the Justice Department requested that Hull get a statement from Moscow that the USSR could assign the claims of the RSFSR, in whose name the nationalization decrees had been issued in 1917.[39] Henderson reported a week later a conversation he had had with Plotkin in Moscow. Plotkin told him that there was never any official transfer of the title to confiscated assets from the RSFSR, but that they ipso facto belonged to the USSR in its foreign relations. Henderson replied that what was obvious to Soviet authorities would not be to American courts, so he suggested that Troyanovsky in Washington elaborate on his note of July 21 to cover this point. Plotkin agreed and requested that the State Department write the desired note for Troyanovsky to sign.[40] The Soviet Ambassador delivered the signed note to Hull on September 14.[41]

This still did not settle the issue to the satisfaction of the court-appointed referee in the matter of the Moscow Fire Insurance case. Henry Munroe, the counsel for the Treasury Department, requested that Plotkin get a ruling from the Commissariat of Justice or from a Soviet court on the legality of Litvinov's assignment for the USSR of claims based on decrees of the RSFSR. Plotkin offered a long legal opinion on behalf of the Foreign Affairs Commissariat, but failed to acquire what Munroe had sought.[42] It was not until January 9, 1937, that Henderson and Litvinov exchanged notes clarifying the wording of the Litvinov Assignment. Litvinov wrote:

> ...the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights or interests therein located abroad of all corporations and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors.
>
> You are further informed that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics... or their predecessors from American nationals[43] including corporations, companies, partnerships, or associations...

Finally, on November 28, 1937, Henderson obtained from the Commissariat of Justice a statement that the Soviet decrees of 1918 did in fact nationalize all Russian insurance company property irrespective of its nature or location.[44]

The Belmont Case Before the Supreme Court

On November 17, 1936, Solicitor General Stanley Reed filed a petition to

the Supreme Court for a writ of certiorari to review the Belmont case. He enumerated the alleged errors made by the Circuit Court (essentially, its rejection of the government's contentions), and urged that the case had sufficient federal importance since there were fifteen suits involving eight million dollars pending in various courts based upon the Litvinov Assignment. He submitted that the crucial issues were the authority of the President to conduct foreign relations without the hindrance of the states and the cordiality of Soviet-American relations. The Justices of the Supreme Court granted the writ on December 21.[45]

Solicitor General Reed, with the assistance of six government attorneys (Acting Assistant Attorney General W. W. Scott, Special Assistants to the Attorney General David Hudson, A. A. Feller, and Albert Levitt, with Henry Munroe and Paul Sweeney), filed a sixty-five page brief for the United States in February 1937. The brief began by posing two questions: "Was the right to receive this bank deposit subject to the operation of the Soviet decrees which transferred the right to the Soviet Government?" and "Is there any controlling public policy which prevents the enforcement of that right, in a Federal court, by the United States as assignee of the Soviet Government?"[46] The facts of the case were presented as they had been in the Second Amended Complaint, and the specification of errors appeared as they had in the Petition for Writ of Certiorari.

The brief consisted of two principal arguments with eight sub-points. The first dealt with the acquisition of the right. There was a debtor-creditor relationship, the brief asserted, between a bank and a depositor. While the obligation to pay was situated at the place of the bank, the right to receive was situated wherever the creditor may be. In this case, the Petrograd Metal Works (the creditor) was located in Russia, where the Soviet government nationalized it in 1918. This transfer gave the right to receive the deposit to the Soviet government. When the domicile of the assignor and assignee and the place of the assignment are the same, the brief continued, the law of that place governs the validity of the assignment.[47]

The government's brief further contended that if a bank deposit had a situs, that situs was at the domicile of the creditor, not the debtor. To prove this proposition, the brief cited an old doctrine of conflict of laws, mobilia sequunter personam (movables follow the law of the person). This was a doctrine first expounded by Bertrand D'Argentre, a sixteenth century French legal commentator who advocated that property of a mobile nature (like money) must be governed by the laws governing the possessor. In the Belmont case, this

doctrine applied meant that the laws of Russia governed the rights and disposition of the Metal Works' assets abroad, rather than the laws of New York simply because the assets were physically located in New York City.[48]

The last point in the government's first proposition was that the state which creates a corporation has the power to destroy it. The citations for this were Canada Southern Railway v. Gebhard and Pendleton v. Russell. The first was a particularly good analogy to the Belmont case. The Canada Southern Railway, charted by the Province of Ontario in 1868 and given a Dominion status by the Canadian Parliament in 1874, issued over eight million dollars worth of bonds which it could not honor because of financial difficulties. In 1878 the Canadian Parliament ordered the re-organization of the railroad and the issue of new bonds, which were to replace the old ones at a lower interest rate and a longer maturity time. Gebhard, a New York citizen who held the older bonds, sued in American courts on the grounds that he had been denied a vested right. The United States Supreme Court decided against Gebhard's suit in 1883. Speaking for the Court, Chief Justice Morrison Waite ruled that, "Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere... Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes."[49]

In the second case, a man had sued in a Tennessee court for recovery of a claim against a defunct insurance company under an order of dissolution by authorities in New York. Justice Stephen J. Field ruled for a unanimous Supreme Court that only New York, the situs of the corporation, had jurisdiction to satisfy claims against the insurance company, even though the domicile of the creditor was not in New York.[50] This would mean that the situs of incorporation determined the legal status of a claim, not the situs of the claim.

The government's brief argued in its second proposition that the government's claim to the Metal Works' deposit was enforceable under American laws. It cited the Mexican confiscation cases where the Supreme Court had upheld property rights acquired by foreign nationalization.[51] The brief explained that the government's claim in this case was based on a Soviet nationalization decree and assignment from the Soviet Union, so its claim should be honored as the private claims were in the Mexican cases. As for public policy, that was determined

by the President in the conduct of his foreign policy. The Fifth Amendment, which forbids governmental confiscation without just compensation, was not applicable in this case because it had been the Soviet government, not the American, that had done the confiscating. And it did not apply to the Belmonts, because they did not own the deposit as the debtor.[52]

The last three points dealt with New York laws and court decisions. The Court of Appeals repeatedly had honored property rights acquired in Russia over property that had been located inside of Russia.[53] Logically, the brief argued, this should extend to claims (legal titles) that were located in Russia as well as tangible property. As for the recently passed Section 977b of the New York Civil Practices Act, the brief contended that it had no application in this case either technically (neither the Soviet government nor the corporation itself were parties in this case) nor substantively, since it could not divest the United States of a right acquired before the passage of the law.[54]

Finally, the brief argued that New York policy could not be allowed to contradict the foreign policy of the President. For this, it cited Justice George Sutherland's obiter dictum in a recently decided case, United States v. Curtiss-Wright.[55] It further contended that the Roosevelt-Litvinov Accords itself was valid because it dealt with the settlement of claims.[56]

As the Solicitor General's brief correctly observed, "The sole issue before this Court is whether the petitioner's complaint states a cause in action against respondents."[57] Because the suit had been dismissed by the lower courts without a hearing on its merits, the only issue that the Supreme Court had to decide was whether the government had a chose in action, a right to plead the case on its merits in relation to other claims against the same res. But, of course, if the Court granted the validity of the government's claim, it was also indirectly deciding the substantive issue of federal supremacy over state laws. Reed hinted at this in his closing statement:

> To subject the enforcement of the right acquired by the United States under the agreement to the varying and uncertain policies of each of the States would doubtless defeat any attempt at a solution of these international questions. [58]

One basic issue was whether Executive foreign policy decisions were binding on state courts and whether an international agreement with less status than a treaty affected property rights and laws at the state and local level.

Cornelius Wickersham, with the assistance of two other counselors (G. Forrest Butterworth, Jr., and Daniel E. Woodhull, Jr.) presented a fifty-three page brief for respondents, the Belmonts. He relied heavily on the opinions

of Judges Swan and Chase in the lower courts and the propositions that had been argued successfully in the New York Court of Appeals since 1923. The two principal doctrines that he presented were that the situs of the property itself determined the laws that were applicable and the forum determined in a conflicts of laws case whether extra-territorial effect of a foreign law was in conflict with the public policy of the forum.

Wickersham conceded that foreign laws could be enforced beyond their jurisdiction, but only by comity. In this matter there was no comity, because the New York Court of Appeals had consistently ruled that Soviet confiscatory decrees were in conflict with the public policy of New York. Many of these decisions had been written by Cardozo, who now sat on the United States Supreme Court. Besides citing a long list of New York cases, Wickersham referred to a 1911 Supreme Court decision that had refused to acknowledge the effect in the United States of a French nationalization decree.[59]

The 1911 case was Baglin v. Cusenier.[60] That opinion had been written by none other than Charles Evans Hughes, who had been an Associated Justice then and was now Chief Justice. The case involved a suit by the Order of Carthusian Monks against the importation into the United States of an imitation Chartreuse liquor made by the French government. The Order had made this trade-marked liquor from a secret recipe in France until 1903, when a French court expropriated the Order's properties. The Order then fled to Tarragona, Spain, with the secret recipe. Hughes wrote that the trademark was still valid in the United States and that the French decrees had no extra-territorial effect. What made this case different from the Belmont case, however, was that the Carthusian monks had escaped from France with their secret that made it possible for them to continue to make their product in a new location. The directors of the Petrograd Metal Works did not flee from Russia with their equipment and continue their business abroad. If the French authorities had actually captured the secret of the Chartreuse liquor (as the Soviets had occupied the Metal Works and continued production in Petrograd), the two cases would have been more analogous.

Wickersham further contended that the deposit of the Metal Works with August Belmont was made in New York, therefore it was a debt created under, and governed by, New York law. Wickersham pointed out that the Metal Works had not assigned its right to the New York deposit voluntarily. To enforce a confiscatory transaction would be against American principles of justice and rights to private property. He reasoned therefore that the ruling in Canada Southern Railway

v. Gebhard was not applicable to this situation.[61]

Counsel also contended that Soviet confiscatory decrees were penal legislation which never had extra-territorial effect.[62] Wickersham was mistaken on his first point. The motive behind the Soviet decree of June 28, 1918, was to prevent industrial disintegration and avoid the transfer of property titles to German agents which was rampant after the Treaty of Brest-Litovsk in March, 1918.[63] When Wickersham used this argument, he was clearly applying a concept of English common law that denial of a vested right is a punishment--an idea that had little application to the Soviet legal system.

Having established a foundation for his case in doctrines of conflict of laws, Wickersham attacked Reed's arguments of foreign policy. The government's assertion, he remarked,

> is based upon the proposition that the public policy of the United States in the matter of foreign relations is to be determined by the Executive under the Constitution. With that proposition in its proper application we have no quarrel. It does not apply here, however, because in the first place, there is no warrant for the assumption that the Executive in the performance of his functions can deprive anyone of his property, or confiscate private property, or by his acceptance of the alleged fruits of confiscation of another power enrich the United States at the expense of private persons by taking their property.[64]

Correctly observing that a treaty cannot violate the Constitution, he argued that the President could not do by executive agreement what he could not do by treaty. As for relations with Russia, Wickersham argued, "We have no quarrel with the so-called Soviet plan of national economy. It is their business and not ours... But this case does not involve international relations of the United States in their true sphere... Rather than international relations, this case involves title to private property in the state of New York. This cannot be taken or affected by an executive agreement."[65]

The Solicitor General filed a Petitioner's Reply Brief in answer to Wickersham's arguments. He placed great emphasis on the diplomatic nature of the case, criticizing the defense for making the assertion that the Litvinov Assignment was a private contract governed by the laws of private transactions. "If the Government of the United States is rendered incapable of realizing the amounts assigned to it by the Soviet Government," Reed warned, "the effect may be to render the entire agreement nugatory and make it impossible for the United States Government to assist its own nationals in the settlement of their claims...."[66] While this was undoubtedly an exaggeration, Reed was probably correct in that friendly Soviet-American diplomatic relations were based to a large degree on

whether each could tolerate the antithetical social system of the other, and a Court nullification of the Litvinov Assignment might have only confirmed Soviet dogmatic opinions of the capitalist order.

Reed also contended that it would be a dangerous doctrine to assume that the American government could protect the rights of aliens against their own government. What Soviet laws did to Russian citizens and property was not a concern of the United States. As a recognized country by this nation, Reed continued, Soviet laws had to be respected as those of an equal sovereign; and to prove what Soviet policy was on this matter, Reed offered as evidence Ambassador Troyanovsky's note of July 21, 1936, to Secretary of State Hull.[67]

The Justice Department never argued in the Belmont case that an executive agreement had, or should have, the equal force of a treaty. The basic argument of the government was that recognition, being a political act, and the conditions attached to it were not subject to judicial review on their merits. Solicitor General Reed chose to concentrate his attack on the validity of the Litvinov Assignment and the international character of the obligations therein. The defense stressed the property rights aspect of the case. Yet, it never successfully answered the charge that the Belmonts did not own this depcsit, so its property was not being confiscated. Nor did it ever say what the Belmonts intended to do with the deposit since they rejected both the government's and the New York receiver's claim to it. Whereas the government emphasized international politics as the frame of reference to judge this case, the defense attempted to apply a universal standard of legal principles, based on Anglo-American common law.

On February 18, 1937, the New York Supreme Court ordered John R. Crews, its appointed receiver of the Belmont deposit, to submit to the jurisdiction of the United States Supreme Court in this case. On March 1 Crews sought a motion to intervene in the Belmont case. If he became a party to the case, he petitioned, the Court could decide the case on its merits, which would determine the order for the distribution of the Metal Works fund.[68] The Justices of the Supreme Court rejected his motion to intervene,[69] whereupon Crew's attorneys filed his position in the form of an amicus curiae brief. This brief amounted to little more than a summary of New York Court of Appeals decisions on Russian corporate property and a restatement of New York law. In substance, it added little to the arguments already presented by Wickersham.[70]

There were two other amicus curiae briefs, both arguing in favor of the defendants. One was presented by Boris Komar for the Day-Gormley Leather Company,

and the other by Robert J. Sykes and William C. Morris for the President and Directors of the Manhattan Company. With minor changes in stress, these briefs followed Wickersham's line of reasoning. In the latter brief, there was added one new contention. Sykes and Morris argued that the RSFSR had confiscated the Metal Works plant, but it was the USSR that had made the assignment to the United States.[71] As mentioned before, this was a bogus argument and did not affect the outcome of the issue.

The Supreme Court heard the oral presentation of the Belmont case on March 4, 1937. Solicitor General Stanley Reed, dressed in formal attire, represented the government and Cornelius Wickersham spoke for the Belmonts. A transcript of the argumentation was taken by a private stenographer, but it has been lost, so that there is no record of what was said that day. It can be assumed that Reed and Wickersham summarized their ideas as written in their briefs.[72]

Sutherland's Decision in the Belmont Case

The Supreme Court handed down its decision in the Belmont case on Monday, May 3, 1937. Justice George Sutherland read his opinion for the unanimous Court. Justice Harlan Fiske Stone delivered a concurring opinion, which agreed with Sutherland's opinion in its result but differed in the reasons for that result. Chief Justice Hughes, who must have had more than a passing interest in this case, had appointed Sutherland to write the Court's decision. It is assumed that Hughes silently agreed with Sutherland's opinion, rather than that of Stone. Justice Cardozo, who had heard so many of the Russian corporate cases while he sat on the New York Court of Appeals, joined Justice Louis Brandeis in concurring with Stone's opinion rather than that of Sutherland. While the Court stood united in its decision to overturn the judgments of the lower courts, it was divided 6-3 on the constitutional and legal grounds for their conclusion.

Sutherland's eight-page opinion began with a review of the principal legal and diplomatic facts of the case. He placed the issue within the framework of Soviet-American relations. "The [Litvinov] Assignment and requirement for notice [from the government to Moscow of sums recovered] are parts of the larger plan to bring about a settlement of the rival claims of the high contracting parties," he observed, "...and the case, therefore, presents a question of public concern, the determination of which well might involve the good faith of the United States in the eyes of a foreign government."[73] This assumption by Sutherland may not have been true in the diplomatic reality of 1933, but it indicated that Sutherland was convinced by the Justice Department's arguments of the diplomatic importance of the Belmont case.

Once he had established the diplomatic nature of the case, Sutherland quickly dispatched the respondent's argument that New York law governed this action in law. He reviewed the precedents of Underhill v. Hernandez (1897), Oetjen v. Central Leather (1918), and Ricaud v. American Metal (1918) to the effect that the courts of one nation may not sit in review of the laws of another, and that the granting of diplomatic recognition was a political rather than a judicial matter. Sutherland further recounted the English precedent of Luther v. Sagor (1921). Then Sutherland elaborated on his interpretation of dual federalism: "Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government." Furthermore, in his plenary power to grant diplomatic recognition, "the Executive had authority to speak as the sole organ of that government."[74]

Sutherland's next observation became a benchmark in American constitutional law. For the first time the Supreme Court endorsed the theoretical speculation that an executive agreement could have the legal effect of a formal treaty without the advice or consent of the Senate. "The recognition, establishment of diplomatic relations, the [Litvinov] assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between two governments," Sutherland observed. While the Roosevelt-Litvinov agreements did not constitute a treaty, they did instrument the President's conditional granting of recognition, which was his constitutional prerogative. If treaties have constitutional precedents over state laws, then so do executive agreements when concluded under the Chief Executive's plenary power. "In respect of all international negotiations and compacts," Sutherland asserted, "and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist... it is inconceivable that any of them [states] can be interposed as an obstacle to the effective operation of a federal constitutional power."[75]

Sutherland stood on a firm foundation of established precedents that a treaty has the effect of domestic law in the United States as well as a contract in international law. As domestic law, a treaty is equal in weight with constitutional law and national legislation, which supercedes state constitutions and laws whenever there is a conflict. He was correct furthermore in that there were international accords other than treaties acknowledged in international law, and that the Supreme Court had taken notice of executive agreements for the purpose of judicial review under its original jurisdiction. While the Supreme

Court had upheld executive trade agreements concluded pursuant to Congressional acts, it had never endorsed an executive agreement enacted by the President alone. The critical point was not that the Court had sanctioned all executive agreements, but only one concluded by the President pursuant to his exclusive power to grant recognition, and conditional recognition at that.[76]

Sutherland had resorted to a doctrine that the Solicitor General had not been bold enough to present. He completely dismissed the legal questions of conflicts of law, situs, and law of the forum by simply rejecting the relevance of New York law. If the Litvinov Assignment were an international compact, only federal policy was in question. In the second part of his opinion, Sutherland likewise dismissed respondent's argument that the Fifth Amendment prohibited fulfillment of the Litvinov Assignment. Sutherland reiterated that if confiscation were a Soviet policy, the Supreme Court had no power of judicial review unless it affected the property of Americans in the United States. He further noted that the Belmonts did not own the account in question, but merely acted as its custodian, so there was no question of invoking the Fifth Amendment.

Sutherland concluded his opinion by noting that the Court had only decided that the government had a proper chose in action in this case. The government merely had won the right to argue its case on its merits in the federal courts. Yet, Sutherland's opinion was so sweeping in its declaration of the constitutionality of executive agreements that it now seemed that the Justice Department would surely win its cases to collect all former Russian deposits in the United States.[77]

Stone's Opinion in the Belmont Case

Justice Harlan Fiske Stone agreed with the unanimous Court that the government's chose in action should be allowed, but he disagreed with Sutherland's written opinion of the case. "I agree with the result, but I am unable to follow the path by which it is reached," he wrote in the first line of his concurring opinion.[78] He believed that the principal issue was one of conflict of laws, rather than international law. Arguing from a narrower perspective than Sutherland, Stone concluded that no public policy of New York would be violated if the United States litigated its claim against the Belmonts in New York courts.

Stone's first point was that if the object of the suit had been real property located in Russia when it was expropriated by the Soviet government, there would be no legal challenge to its title by confiscation in American courts. He cited the Oetjen and Ricaud cases, as well as Salimoff v. Standard Oil, indicating that he would give due weight to the New York Court of Appeals rulings

on Russian property which Sutherland had ignored. Stone further noted that a claim to intangible property that was valid at the place of origin would also be valid in New York, provided the New York policy regarding the debtor within its jurisdiction did not otherwise prevent its honoring the claim.

Having presented his principal observations about property law, Stone continued with an exposition on conflict of laws doctrines. He observed that the Court on several occasions had ruled that one state may refuse to honor a transfer of property within its borders made in another state if the transfer conflicted with its public policy. Stone cited numerous precedents for this, all of which concerned conflict of laws among the American states and had little bearing on international conflicts.[79]

He contended further that a state may disregard a transfer of property when the object of the transfer was a chose in action due from a debtor within its boundaries to a foreign creditor. He cited four precedents for this observation. The first three, however, were cases that had concerned questions of private international law, not diplomatic transactions. In Harrison v. Sterry,[80] Chief Justice Marshall had ruled that when a transatlantic trading company had gone bankrupt its creditors in the United States would be satisfied first, under American state laws, before foreign claimants could recover any of the company's remaining property in the United States. Likewise, Justice Day had written a century later in Disconto Gesellschaft v. Umbreit[81] that the state of Wisconsin was not compelled to release a bank account to a German banking firm if doing so denied the legal satisfaction of a Wisconsin citizen's claim against the account for an unpaid debt. The legal principle was that the courts of the state where the property was situated could decide whether to extend comity to foreign claims or not, depending on the state policy concerning property rights and obligations.

The other two precedents cited by Stone at this point were both New York Court of Appeals cases, which had no binding effect on the Supreme Court of the United States. One was an 1893 case involving the rules of property liens upon an estate in New York to New York citizens, although the owner of the estate was filing bankruptcy under Wisconsin law.[82] The other case was Vladikavkazsky Ry. Co. v. New York Trust Co., the 1934 case in which the Court of Appeals refused to grant comity to the Soviet nationalization decrees concerning former Russian corporate holdings in New York. That was precisely the issue which was before the Supreme Court in the Belmont case, and Sutherland's opinion had dismissed it by denying the very legal existence of the state of New York in this type of case.

Stone's contention was that a chose in action had a situs within state law. He cited eight sources for this: six Supreme Court cases, one English Chancery decision, and the 1934 American Law Institute's Restatement of the Law of Conflict of Laws. All six Supreme Court precedents involved conflicts among state laws, not international law. Perhaps the only conclusion that could be drawn from these cases was that there was no established way to resolve interstate conflict of laws. In one Justice Joseph McKenna had found that a debt was the property of the creditor and controlled by the laws that controlled the creditor himself.[83] This was just the opposite of Stone's assumption that the forum of the property situs determined what laws govern it. In another case, Justice Brandeis had written:

> The contract of deposit does not give the bank a tontine right to retain the money in the event that it is not called for by the depositor... If the deposit is turned over to the State in obedience to a valid law, the obligation of the bank to the depositor is discharged.[84]

This would have meant that the Belmonts had no claim of their own to the Metal Works' account, but that the account fell either to the American government (by assignment of the Soviet government which had succeeded to the company's property), or to the state of New York for satisfaction of claims against the company from New York citizens, of which there were none.

The English Chancery case was In re Russian Bank for Foreign Trade, decided in 1933.[85] The court had ruled that Soviet decrees had ended the juristic existence of Russian banking houses, including their branches in England. After granting that much comity to Soviet law, the court refused to allow Soviet law to invalidate the claims of British subjects against the former bank assets located in England. This seemed to be a just finding in order to protect Englishmen in their transactions with foreign corporations within the Realm, but it did not apply to the Belmont situation since there were no New York residents' claims against the Metal Works' account.

Stone referred to two sections of the Restatement of conflict of laws authored principally by Joseph Beale as an attempt to codify this difficult area of the law. The first section cited by Stone held that a state could exercise authority over the obligor who is within its jurisdiction although it may have no jurisdiction over the obligee.[86] No one could deny that New York laws covered the Belmont company, but this did not mean that New York law was the only law covering the Metal Works' account with the Belmonts. The other cited section read:

> The original creation of property in an intangible thing which exists only because it has been created by law is governed by the law of the state which created the intangible thing and interest therein.[87]

Stone interpreted this to mean that New York law applied to the chose in action concerning the Metal Works' deposit in New York City, but "an intangible thing" could also mean the account itself, which was made possible by the laws of Russia under which the Metal Works was incorporated and functioned until 1917.

Stone reasoned that there was no New York public policy that refused to recognize the government's chose in action in the Belmont case. The Belmonts were the debtors of the account, and as such they had no right to question the government's claim. They did not own the deposit and they had lost nothing by Soviet confiscation, so their burden under law had not changed. But whether the New York courts awarded the Metal Works' account to the government as the only claimant to it was a question of New York state public policy. In Stone's opinion, the New York courts were free to subordinate the Soviet government (and its assignee, the American government), as the successor to the Metal Works, to private creditors. In other words, Stone was saying that the government had a legitimate chose in action in this case, but that its claim might be inferior to other claims against the same account.[88]

Stone dismissed Sutherland's dissertation on Presidential powers in foreign affairs as irrelevant to the legal facts of the case. He asserted that:

> It is unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty within this rule, for neither the allegations of the bill of complaint, nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any state policy is to be overridden....
>
> There is nothing ... to suggest that the United States was to acquire or exert any greater rights than its transferror, or that the United States, as assignee, is to do more than the Soviet government could have done after diplomatic recognition--that is, collect the claims in conformity with those [New York] laws.[89]

Stone concluded that the Supreme Court's reversal of the Circuit Court's opinion in the Belmont case was correct since it merely established that the United States had a chose in action which did not exclude other claims to the same fund. Yet he added an important last sentence: "There is no occasion to say anything now which can be taken to foreclose the assertion by such claimants of their rights under New York law."[90] He correctly realized that Sutherland's opinion had been so broad in its validation of the executive

agreement that it implicitly precluded any other challenges to the same account.

The mistaken impression that Stone gave in his opinion was that the Supreme Court had been consistent in its adjudication of conflicts cases. Not even Stone himself was consistent in such matters. For example, he had written in 1925 the Court's unanimous decision in Second Russian Insurance Co. v. Miller[91] that the 1916 Tsarist ukaze forbidding Russians to trade with Germans did not apply to the Second Russian Insurance Company's branch office in the United States. He wrote that to uphold the ukaze's effect here would make unlawful what would be otherwise lawful in the forum, which he believed was extending legal comity too far. In 1932 Sutherland had written the opinion in a case in which he cited several precedents that for taxing purposes the situs of intangible property followed the domicile of the creditor.[92] Stone, however, wrote a dissent in that case for himself, Holmes, and Brandeis, in which he stated that situs was "not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired."[93]

The Supreme Court was not even consistent in conflicts cases during the 1936 term. On the same day that it heard the Belmont case, the Court listened to the arguments in Broseman v. Connecticut General Life Insurance Co.,[94] which involved the coverage of a group insurance policy contracted in Pennsylvania by a Connecticut company with Texas workers. Butler wrote for a unanimous court that the law of Pennsylvania, the situs of the contract, was to determine the obligations of the policy. On April 26, 1937, Stone delivered the opinion for a unanimous court in First Bank Stock Corp. v. Minnesota,[95] which raised questions similar to those raised in the above 1932 case. This time the Court decided that the stock holdings of a firm chartered in Delaware could be taxed in Minnesota. Stone wrote on this occasion that:

> The rule that property is subject to taxation at its situs, within the territorial jurisdiction of the taxing state, readily understood and applied with respects to tangibles, is in itself meaningless when applied to intangibles, which, since they are without physical characteristics, can have no location in space.[96]

Yet only one week later Stone argued in his concurring Belmont opinion that a bank account and a chose in action (both intangibles) did have a situs. Was Stone perhaps employing "a convenient fiction which may be judicially employed or discarded, according to the result desired"?

As for the question of international debts which Stone had ignored, the Supreme Court had ruled consistently that this was strictly a diplomatic affair. Chief Justice Hughes had ruled for a unanimous Court in Russian Volunteer Fleet

v. United States[97] that a private Russian corporation could sue in the Court of Claims for monetary recovery of ships seized by the American government during World War I. Stone cited this case in his Belmont opinion to show that the Fifth Amendment did protect aliens from unlawful American confiscations. But this case involved a private claim, not a claim between sovereigns. In a 1934 case, also written by Hughes, the Court ruled that an American state and a foreign sovereign could not settle a debt through the courts, but by national diplomacy "through treaty, agreement of arbitration, or otherwise."[98]

The Russian Volunteer Fleet case was distinguished in Cummings v. Deutsche Bank, decided on February 1, 1937.[99] Justice Pierce Butler ruled for a unanimous Court (Roberts and Stone not participating) that the Justice Department, pursuant to the Trading with the Enemy Act of 1917 and the Settlement of War Claims Act of 1928, could sequester German property in the United States that had been seized in World War I pending the satisfaction by Germany of claims against it by American nationals. Butler further contended that this was not a violation of the Fifth Amendment. Several of the Justices realized by 1937 that there was no reason to protect alien property in the United States which could be applied legally to foreign debts to American claimants.

Stone's opinion in the Belmont case did not strongly argue his contentions as to rules of law which govern intangible property rights and chose in action. If he were contending that the forum must decide for itself the rules which govern intangibles, he was granting much local autonomy to adjudicating property cases. Certainly in matters involving international transactions and the property claims of sovereigns, one should proceed cautiously in subordinating national policy to local legal interpretations. Stone apparently believed that Sutherland's opinion granted the national government an unjustified constitutional authority over the states to govern property within their jurisdiction.[100]

Interestingly enough, Stone personally approved of Roosevelt's reversal of the sixteen-year policy of non-recognition of the Soviet Union. As early as 1931 he had been exposed to the opinions of John Bassett Moore, who expressed to Stone nothing but contempt for a foreign policy that ignored the established regime in Moscow and abided by the actions of the defunct Kerensky representatives in the United States.[101] A week before Roosevelt's recognition of Moscow, Stone wrote to Felix Frankfurter (who was in England) about his favorable anticipation of the diplomatic event. He told Frankfurter that he believed the non-recognition policy was one of the worst in American diplomatic history.

Stone was more concerned with the legal effect of recognition than the practical, since he saw little immediate advantage for the United States in resuming relations with the Russians. He believed that it was important for the government to follow the principle that recognition was due to any stable foreign government, although he rejected the idea that recognition should be construed as an approval of the recognized regime.[102]

Stone, however, did not adhere to Sutherland's ideas of plenary government powers in foreign affairs. He regretted that he had not participated in the Curtiss-Wright and Deutsche Bank decisions because of a serious illness which incapacitated him from October 1936 to February 1937. He later wrote to Yale Professor Edward Borchard that he had strongly disapproved of Sutherland's opinion in the Curtiss-Wright case.[103]

Stone had been assisted in his opinion by Justice Cardozo, who had participated in the Russian corporate property cases in New York as a member of the Court of Appeals from 1913 to 1932. Cardozo's views on these cases were examined in detail in Chapter II, and these views no doubt influenced his judgment in the Belmont case. He explained his position to Stone in a memorandum dated April 21, 1937. Cardozo told him that he agreed with the result of the majority decision because he believed that the Soviet nationalization decree was not in conflict with New York public policy in this case since no creditor or stockholder of the Metal Works was involved in this suit. Cardozo further stated that New York did have the right to refuse to enforce a foreign confiscatory law if it prejudiced the rights of claimants in New York. He listed numerous precedents, several of which Stone used in his written opinion.[104] Stone's separate opinion gave Cardozo the opportunity to concur with the result without identifying himself with Sutherland's opinion.

Scholarly Reaction to the Belmont Case

There was little public reaction to the Belmont case. Except for legal journals, it went almost unnoticed. There was a small report of the decision in the New York Times.[105] The Wall Street Journal gave only eleven lines to it.[106] The Chicago Tribune gave thirty-nine lines to it, but misreported that the Court had awarded the Metal Works account to the government.[107] The Belmont decision went unreported in the Washington Post until Franklyn Waltman wrote a column on it on May 6. Waltman accurately stated that Sutherland's opinion had far greater significance than just its meaning for the Litvinov Assignment. He feared that the decision could mean that the national government could regulate minimum wages, maximum hours, and working conditions through its foreign

relations power and its involvement in the International Labour Organization.[108] This was a false but often repeated fear, since the Belmont dealt only with the legal effect of diplomatic recognition of a foreign government.

The Belmont decision received favorable reviews in the Yale Law Journal, Harvard Law Review, University of Chicago Law Review, and the Texas Law Review.[109] The George Washington Law Review concluded that the decision would apply only to alien rights and would not affect American property.[110] The Rocky Mountain Law Review correctly predicted that the government would eventually acquire the entire Metal Works' account as a result of Sutherland's opinion.[111] The Virginia Law Review, on the other hand, reported that Sutherland's dicta was unnecessary to resolve the case and that Stone's opinion was legally the more correct one.[112] The California Law Review was very critical of Sutherland's opinion, calling it without basis in principle or practice.[113]

The most critical reviews of the Belmont case appeared in the prestigious American Journal of International Law by editors Philip C. Jessup of Columbia University and Edwin Borchard of Yale. Jessup criticized Sutherland for ignoring the difficult question of situs, which he believed was very important in determining the case. He also criticized Sutherland's reliance on the Oetjen case, which Jessup contended was incorrect in its assertion that recognition was legal validation of the recognized country's laws and irrelevant to the Belmont case since the property was located in the United States rather than abroad. Jessup further examined the legal technicalities of the case, concluding that Sutherland's opinion had not satisfactorily answered the question as to what extent the national foreign relations power extended to property rights, or whether American citizens still had any claim against the Soviet Union for confiscation of their holdings.[114]

Borchard was even more censorious than Jessup. His basic objection was that Sutherland's decision tended to subordinate property rights to governmental policy judgments, which he strongly opposed. He asserted that the Soviet nationalization decrees had applied only to property located in Russia and had no extra-territorial effect. Borchard also claimed that the Oetjen case was mistaken to give the granting of recognition any legal effect beyond establishing diplomatic relations. He refused to concede that the Belmont case involved anything more than a property right. He pointed out that for sixteen years the United States had refused to recognize Soviet Russia because of its

expropriation of American property, yet this decision would legally validate exactly what the State Department had objected to for so long.[115]

Borchard was so concerned that the Belmont case might become a dangerous precedent for nationalization of foreign property in international law that he initiated a correspondence with the State Department and Justice Stone. He wrote to Assistant Secretary of State R. Walton Moore that the government was following a bad policy to prosecute the Litvinov Assignment cases. He bemoaned the fact that the United States was too eager to profit from Soviet confiscations, which it had condemned for sixteen years. He warned that the result of such a policy would seriously damage American property interests abroad.[116]

Moore had received other such letters attacking the government's litigation of the Litvinov Assignment cases. He had explained in one response that the United States neither condoned nor condemned Soviet confiscations of Russian property, as Moscow had the right to do whatever it wanted to do in its own territory. He reassured the inquirer that the suits in New York courts did not concern the negotiations with the Soviet Union for the recovery of American property in Russia.[117]

Borchard repeated the same objections in his letters to Stone. He feared that Belmont would only perpetuate the error of Oetjen. He warned Stone that the Belmont decision would jeopardize over $100 million of American claims against Soviet Russia for only $8 million of Russian property in the United States. Borchard also expressed his doubts as to the legal effects of an executive agreement. In addition, he sent to Stone a draft of his editorial for the American Journal of International Law.[118]

Stone responded to Borchard's letters with much cordiality. He, too, doubted whether an executive agreement, or a treaty, could deprive a state of its constitutional right to regulate property within its own jurisdiction.[119]

The Guarantee Trust Case

The immediate effect of the Belmont decision was to encourage the Justice Department to continue its litigations to recover all former Russian corporate assets in the United States. During 1937, the Justice Department had collected $206,443.37 from the Litvinov Assignment and was pleading eleven cases before state and federal courts.[120] In the following year, it collected $1,500,000 and was handling forty cases.[121]

The State Department helped in the Justice Department's suits as much as it could without jeopardizing Soviet-American relations. One Justice Department

official requested that George F. Kennan read Stone's opinion in the Belmont case and get the Soviets to make statements that would refute every negative point that Stone had raised. Kennan thought that that was a bad idea and did not do it.[122] Yet the State Department did arrange for David E. Hudson to go to Moscow in the summer of 1939 to discuss the Litvinov Assignment cases with Soviet legal officials.[123] And it was responsible for bringing Marc Plotkin, the Soviet legal advisor to the Foreign Affairs Commissary, to the United States to testify in legal actions in New York cases.[124]

The next major case after the Belmont decision was the suit against the Guaranty Trust Company of New York which the Justice Department had initiated on September 21, 1934. The referee appointed by the New York Supreme Court heard extensive testimony on claims during the spring of 1935, including the depositions by Serge Ughet (the Russian representative to the United States recognized by the State Department until November 16, 1933), former Russian Ambassador Boris Bakhmeteff (who had become a professor of civil engineering at Columbia University), and Dimitry G. Ter-Assatouroff, a former official of the Russian Ministry of Finance. Ughet reported that the Russian government had had an account of $5,001,849.79 with Guaranty Trust prior to November 8, 1917, but that the bank had refused to release the fund to him. Stuart Patterson of Guaranty Trust testified by affidavit that the bank had decided on February 25, 1918, that it would freeze this account since the Soviet government had confiscated $9 million of its assets in Russia (although the bank had reported a claim to the State Department of only $1,650,000). Ter-Assatouroff reported that the bank had refused to release the funds in 1922 for the American famine relief project to Russia. When the New York referee ruled against the American government's claim to the fund, the Justice Department sued the Guaranty Trust Company in United States District Court.[125]

Judge Francis G. Caffey dismissed the government's complaint on its merits on November 2, 1936. He ruled that the six-year statute of limitations of New York had run out against a claim for this fund with Guaranty Trust. The judge reasoned that the State Department had recognized Bakhmeteff and Ughet as bona fide representatives of the Russian state in the United States, and since they had failed to bring a suit against Guaranty Trust before 1933 the government had no case against the bank by means of an assignment by the Soviet Union. He also ruled that diplomatic recognition was not retroactive to the effect of voiding all business affairs of Russian nationals in the United

States prior to 1933.[126]

The government was granted an appeal to the Circuit Court on February 3, 1937. The Circuit Court heard the case on June 8 and rendered its decision on August 16, reversing Judge Chaffey's dismissal. Judge Swan delivered the divided Court's judgment that was largely based on the Belmont precedent. An even more strongly worded concurring opinion was written by Manton, who elaborated on sovereign immunity as being superior to state statutes of limitations. Judge Chase voted in favor of sustaining Chaffey's ruling, but he did not write a dissent in this case.[127]

John W. Davis filed a writ of certiorari on behalf of Guaranty Trust on November 9, 1937, and the case was accepted by the Supreme Court for review. The Court heard the argumentation delivered by Solicitor General Robert H. Jackson and John W. Davis on March 28 and 29, 1938. The Justices decided unanimously to reverse the Circuit Court decision that the New York statute of limitation did not run against a sovereign. The decision was delivered by Justice Stone on April 25, 1938. Stone took the narrow approach to this case as he had in Belmont, stating early in his opinion that the central issue was the effect of New York law over property within its jurisdiction, not the diplomatic nature of the Litvinov Assignment. He insisted that when a sovereign appears voluntarily in court as a suitor it abandons its immunity from suits against it, according to the laws and procedures of the forum. Since the Department of State had recognized the two representatives of the Provisional Government as legal agents of the Russian state until 1933, the courts were open for fifteen years for suit against the Guaranty Trust Company. Stone conceded that recognition was a political rather than a judicial question, but he reserved to the courts the right to judge the legal consequences of recognition in handling litigations before them.[128]

What shocked Stone most was the idea that the recognition of the Soviet Union in 1933 should invalidate sixteen years of business transactions between Americans and the previous Russian representatives in the United States. Having already stated that diplomatic recognition was a political question, he went ahead and expressed his judicial interpretation of it:

> The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established

> diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on.[129]

Did Stone believe that diplomacy existed only to facilitate international business? Contrary to what either Justice Stone or Professor Borchard may have believed, recognition was the political act of establishing diplomatic relations for principally political reasons. To what extent the State Department wished to facilitate American business interests was a policy decision based more on international expediency than principles of domestic property laws.

The result of the Guaranty Trust case was that the Supreme Court denied the government its claim to over $5 million in a New York bank because of the New York statute of limitations. On the surface, the decision was correct in its legal technicalities. This case was the legal result of the State Department's own confused Soviet policy from 1917 to 1933. And it is interesting to note that the Secretary of State who had advocated the non-recognition policy was the Chief Justice in 1938 who concurred with Stone's opinion. Technicalities aside, the Guaranty Trust case was probably a bad decision. The Guaranty Trust Company had no right to settle its claims against the Soviet government utilaterally by its own confiscation of Russian state assets it controlled. That the bank got away with its private confiscation was the fault of the State Department, which should have recognized no Russian government after 1917 and frozen all Russian property in the United States, as it had done with German holdings after 1917. Stone cited the Belmont decision only once, choosing to ignore the Court's previous sanction of an executive agreement as overriding state property laws. He also chose to ignore Hopkirk v. Bell,[130] an 1806 precedent that established that a state statute of limitations was not a barrier to international claims in the face of a diplomatic contract.

It might have appeared in 1938 that the Court had reversed its decision in the Belmont case. Certainly it had rejected the government's contention that the Belmont decision had given its claim to Russian assets superiority to all other claims.[131] The immediate contradiction between the unanimity of the Belmont case and the unanimity of Guaranty Trust, however, cannot be explained by just the changes of personnel on the Court. Six of the nine Justices who had sat on the Court during the earlier case also sat for the latter. Justice Willis Van Devanter had retired, being replaced by the liberal Hugo Black, and more importantly Sutherland had retired in January 1938, being replaced by

Solicitor General Stanley Reed. Reed disqualified himself in the Guaranty Trust case (since he had initiated it), and Cardozo, who had suffered a serious heart attack on January 8, 1938, did not participate either. This meant that Justices Butler, McReynolds, and Chief Justice Hughes modified their attitudes toward the validity of the government's claims in the Litvinov Assignment cases.

The Russian Insurance Deposits Cases

The Guaranty Trust case dealt only with the government's claim to former Russian state assets; it did not concern its claims for former Russian corporate assets. For these funds, the Justice Department took its cases to the New York courts. The Appellate Division of the New York Supreme Court had dismissed the government's complaint against the Manhattan Company, which was holding in trust $245,307.60 for the two surviving directors of the Northern Insurance Company of Moscow. Upon review, however, the Court of Appeals reversed this dismissal on January 11, 1938. Judge Harlan W. Rippey ruled for the majority that the Belmont case had established that the United States did have a chose in action concerning all former Russian corporate assets in New York, including the defunct insurance companies' deposits which had been turned over to the state Superintendent of Insurance. Whether the government's claim was superior to all others, Rippey said, was not at question here, but "Prima facie, at least, plaintiff may be entitled to the whole fund." [132]

On the merits of the government's claim, the Court of Appeals divided 4-3 in 1939 in a case involving over $1 million of the Moscow Fire Insurance Company. Chief Judge Irving Lehman, who had written a dissent to the previously mentioned case, wrote the majority decision, while Rippey wrote the dissent. Lehman's main line of thought was based on Stone's opinions in Belmont and Guaranty Trust: while the acts of a sovereign in its own territory are not adjudgable in the courts of another nation, the extra-territorial effect of them can be determined by the laws of the forum wherein a case arises involving foreign legislation. Even though expert witnesses had testified to the contrary, Lehman decided that the Soviet confiscatory decrees were never intended to affect Russian corporate property outside of Russia. He even referred to the rights of the company's creditors and stockholders living in Russia, as though the Soviet government had no claim based on nationalization even in Russia. He concluded that since the Soviet government had no valid claim to corporate property in New York, neither did the American government by assignment. Therefore, Lehman ordered that the assets of the Moscow Fire Insurance Company,

domestic creditors having already been satisfied, be distributed to the surviving creditors and policyholders of the parent corporation (which had been in Moscow before 1918) who were neither American citizens nor claimants to the branch bank in New York.[133]

The Supreme Court upheld the Court of Appeals' ruling in the Moscow Fire Insurance case on February 12, 1940, by a 3-3 divided Court. The Court record showed that Stone, Reed, and Frank Murphy (Roosevelt's second Attorney General who had replaced the deceased Butler in November 1939) did not participate in the decision. It is impossible to know which three Justices voted to reverse the New York decision. They were probably the three Roosevelt appointees Hugo Black, Felix Frankfurter, and William O. Douglas. If this were so, it meant that Hughes, McReynolds, and Roberts voted against the government's claims, based largely on the Belmont decision with which all three had concurred in 1937.[134]

Meanwhile, the government won a case in Ohio, indicating that the New York courts were not being copied in other states. A group of lawyers in Columbus had a $20,000 claim for legal fees against the Northern Insurance Company, which had a $100,000 deposit with the Ohio Superintendent of Insurance in order to do business in that state. The lawyers refused to take $10,000 which Justice Department lawyers offered them, and sued for the entire amount. The Court of Common Pleas in Columbus on September 26, 1936, found in favor of the plaintiffs for $20,960.56. The government had filed an intervening petition, and appealed the decision. The Ohio Supreme Court decided on August 10, 1938, that the Soviet government had nationalized this insurance company in 1918 and that the plaintiffs had performed no legal services for a company that had ceased to exist in the place of its incorporation. So the Columbus lawyers got no money at all.[135]

The Pink Case

The last, and deciding case arising from the Litvinov Assignment was United States v. Pink.[136] This case was the government's suit against the New York Superintendent of Insurance, Louis Pink, for over $1 million of the First Russian Insurance Company after satisfaction of local creditors. Justice Aaron J. Levy of the New York Supreme Court had dismissed the government's complaint on June 29, 1939. His judgment was sustained by the Appellate

Division and the Court of Appeals. Solicitor General Francis Biddle petitioned for a writ of certiorari and the Supreme Court granted it. The Court heard the oral arguments on December 15, 1941, only a week and a day after Pearl Harbor, and rendered its decision on February 2, 1942.[137]

That the Court had granted the writ of certiorari in the first place was an indication that it was not satisfied that Guaranty Trust and Moscow Fire Insurance were the last words on the Litvinov Assignment. By 1942, there were only two Justices left on the bench who had been there for the Belmont case only five years before. Justice McReynolds had retired on February 1, 1941. Roosevelt appointed Senator James Byrnes of South Carolina to take his place. Then Chief Justice Hughes resigned on July 1, 1941. The President chose Harlan Fiske Stone to become the eleventh Chief Justice of the United States. To replace Stone's Associate Justice position, the President appointed Attorney General Robert Jackson. This was now a Supreme Court of "bright young men," most of whom had reached the Court by the rewarding graces of FDR. In contrast to the earlier Court, a majority embraced a positive theory of government, one that held government should help individuals by providing direct services and exerting regulatory powers over the economy.[138] And in foreign affairs, the Justices were outspoken *off* the bench in their support of the President's policy to aid Great Britain short of war against the Nazis.[139]

The Court voted 5-2 to reverse the New York Court of Appeals ruling in the Pink case, thereby sustaining the government's claim to former Russian corporate assets on the strength of the Litvinov Assignment as a valid exercise of the President's powers in foreign relations. Black, Douglas, Frankfurter, Murphy, and Byrnes were in the majority; Stone and Roberts, in the minority. Both Reed and Jackson, who had been Solicitors General during the preparation of the Litvinov Assignment cases, disqualified themselves from participating. Since both the Chief Justice and the senior Associate Justice were in the minority, the Pink decision was assigned to Douglas by the second Associate Justice in seniority, Hugo Black.

Douglas wrote a twenty-four-page opinion that was a strongly worded endorsement of the President's exclusive constitutional powers to recognize foreign sovereigns. He used the Belmont decision as the foundation for his opinion, citing it no less than fifteen times. He first analyzed Guaranty Trust and Moscow Fire Insurance, asserting that they were not determinative in the

specifics of this case. The only precedent he recognized was the Belmont case, which he interpreted to mean that no state could deny the government's claims by the Litvinov Assignment by questioning the validity of an executive agreement. He then reviewed the Belmont case in thirty-seven lines. Douglas also reviewed the diplomacy involved in the case. He, as had Sutherland, placed the issue within its international political context rather than in its narrower domestic legal one.[140]

Douglas also used the Belmont precedent to dismiss the argument that the government would be violating the Fifth Amendment by acquiring this fund to the sacrifice of the insurance company's creditors and stockholders. He pointed out that the domestic creditors of the New York branch of this company had already been satisfied by the Superintendent of Insurance. While the government had the responsibility to protect the claims of its citizens, it had no obligation to respect the claims of aliens arising from transactions with the parent corporation in Russia. "There is no Constitutional reason why this Government need to act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts," he observed. He saw no reason why New York should legally protect foreign interests while the government was trying to collect assets in order to compensate American claims against the Soviet government.[141]

Turning to the issue of Presidential powers, Douglas strongly reaffirmed Sutherland's views in the Belmont case. He wrote:

> The powers of the President in the conduct of foreign relations include the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.... That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objectives to recognition are to be addressed to the political department and not to the courts.[142]

In the next few lines, he reviewed the verdict of the Belmont case that the Litvinov Assignment was an executive agreement that had the force of treaty in binding the states to the national policy. To enforce the results of the Moscow Fire Insurance decision, Douglas contended, would allow New York courts to aggravate the very international conflicts that the Roosevelt-Litvinov Accords had sought to solve. He concluded that the Court could not allow this:

> We hold that the right to the runds or property in question became vested in the Soviet Government as the successor to the First Russian Insurance Co.; that this right has passed to the

> United States under the Litvinov Assignment; and that the United States is entitled to the property as against the corporation and the foreign creditors.
>
> The judgment is reversed and the cause is remanded to the Supreme Court of New York for proceedings not inconsistent with this opinion. [143]

Douglas had written his opinion using his vast knowledge of corporate law to sustain the government's claim even on narrow domestic legal terms. Justice Frankfurter wrote a concurring opinion justifying the government's claim on a broader plane:

> Legal ideas, like other organisms, cannot survive severance from their congenial environment. Concepts like "situs" and "jurisdiction" and "comity" summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of a private litigation, is to invoke a narrow and inadmissible frame of reference. [144]

Frankfurter lambasted the Court of Appeals for following a judicial policy after 1933 that was in conflict with the national foreign policy. "When courts deal with such essentially political phenomena as the taking over of Russian businesses by the Russian government by resorting to the forms and phrases of conventional corporate law, they inevitably fall into a dialectic quagmire," he observed. [145]

The critical question for Frankfurter was not that of state property laws but the functioning of the national foreign policy as determined by the President. He insisted that the Roosevelt-Litvinov Accords must not be read as an explicit business contract, but rather as a diplomatic note whose implicit intent was more important than its precise wording. Frankfurter concluded from the extra-legal evidence that the intent of the Litvinov Assignment was for the American government to acquire these funds in question, and no domestic state policy was relevant to the international debt question involved. [146]

Chief Justice Stone wrote a fourteen-page dissent, which was consistent with his views in the Belmont and Guaranty Trust cases. Taking issue with Douglas' opinion, he insisted that the Belmont case had only decided that the government had a chose in action, but that Guaranty Trust (which he himself wrote) was determinative of the priority of the government's claim in relation to others. He dismissed Sutherland's comments on executive power in Belmont as merely obiter dicta, which was neither binding as precedent nor undistinguished by Guaranty

Trust. He again put the case within the context of state property laws rather than the international frame of reference. "The only questions before us," he maintained, "are whether New York has constitutional authority to adopt its own rules of law defining rights in property located in the state, and, if so, whether that authority has been curtailed by the exercise of a superior federal power by recognition of the Soviet Government...."[147] His answer to the first part was positive, and to the second, negative.

Stone's principal legal thought was that state courts apply foreign laws by comity, and where there was no treaty commitment, there was no federal legal question. Here, Stone refused to acknowledge Sutherland's equation of an executive agreement with a treaty. He argued that the act of diplomatic recognition by the President carried no implied power to deny state courts the right to deny the effect of a transfer of property within its jurisdiction. Stone further contended that the courts did have the power to interpret for themselves the legal consequences of diplomatic recognition:

> Recognition opens our courts to the recognized government and its nationals.... It accepts the acts of that government within its own territory as the acts the sovereign, including its acts as a de facto government before recognition.... But, until now, recognition of a foreign government by this Government has never been thought to serve as a full faith and credit clause compelling obedience here to the laws and public acts of the recognized government with respect to property and transactions in this country.[148]

In contrast to Frankfurter's opinion, the Chief Justice insisted that the Court must interpret the Litvinov Assignment at face value. He interpreted the phrase "that may be found to be due" to mean that it was up to the courts to decide what funds belonged to the Soviet government and its assignee. But what Stone objected to most of all was the idea that the executive alone could abridge state constitutional authority by a diplomatic transaction:

> Treaties, to say nothing of executive agreements and assignments which are mere transfers of rights, have hitherto been construed not to override state law or policy unless it is reasonably evident from their language that such was the intention.... The practical consequence of the present decision would seem to be, in every case of recognition of a foreign government, to foist upon the executive the responsibility for subordinating domestic to foreign law in conflicts cases, whether intended or not,...[149]

As was expected, Professor Jessup and Professor Borchard were very critical of the Pink case. Borchard thought that it was a dangerous inroad into the constitutional guarantees to freedom of property. Most of all, Borchard regretted that the Supreme Court had given a precedent in international law to validate Soviet confiscatory domestic law. Of course, what he did not choose to see was that the Supreme Court of the United States did not have the responsibility to make objective international law, only to function in order to enforce a subjective American foreign policy that was grounded on friendly Soviet-American diplomatic relations in face of their common enemy, Nazi Germany.[150]

Not only was Borchard upset about the result of the Court's legal interpretation of the Litvinov Assignment, but he was also disturbed by its validation of an unusual executive agreement. He felt that even a treaty could not constitutionally do what the Litvinov Assignment had done to private property rights. He wrote to the Chief Justice that the Court had offered the President potential dictatorial powers in foreign affairs.[151] Stone replied in agreement that he detected a political movement in the administration to bypass the Senate by substituting executive agreements for treaties.[152] Coincidentally, Borchard was a good friend of Justice Douglas, who had been a law professor at Yale, too. Borchard was dismayed that his old friend could write an opinion that was so counter to what Borchard thought was sound legal reasoning.[153]

Jessup's criticism was just as sharp as Borchard's, but more farsighted. He speculated that the Pink decision could mean that the President could acquire German Jewish property rights in the United States from Hitler, since Nazi Germany had expropriated all Jewish property. This would have been a far-fetched development for political reasons, but Jessup did not consider political prohibitions on the Presidency on the same exalted plane as constitutional ones. Yet, he realized that Pink could allow American courts to honor the property nationalizations of the Dutch and Norwegian governments-in-exile designed to aid the Allied war effort. Indeed, Jessup's criticism sounded as though he judged the Pink decision in terms of what was judicially desirable in 1942.[154]

Conclusions

Perhaps no American diplomatic transaction has received as much scrutiny in American courts as the Roosevelt-Litvinov Agreements of 1933. Rather than constituting only an international transaction, the agreements touched upon

domestic rights and laws within the United States. In particular, the Litvinov Assignment of Soviet claims to Russian property to the American government raised numerous domestic judicial questions of property situs, comity, chose in action, creditor-debtor laws of the forum, as well as the broader constitutional rights of property which are immune to confiscation without due compensation. Above all other considerations, the Litvinov Assignment gave rise to the judicial interpretation of the constitutionality of executive agreements as domestic law.

For sixteen years, from November 1917 to November 1933, American courts acted in harmony with the State Department policy of non-recognition of the socialist revolutionary government of the Soviet Union. The courts acknowledged the legal power of the Soviet government to confiscate property within its own territory, but refused to accord any legal rights to Soviet claims to property within the United States. The principal legal basis for their numerous judgments was the well-established constitutional doctrine that diplomatic recognition was a political question which the courts were bound to enforce, and that no country could exercise legal rights in the United States without diplomatic recognition. Some judges, however, went further in order to assert that no foreign laws, even those enacted by a sovereign granted recognition by the American government, would be granted judicial comity in the United States if by their nature they directly conflicted with American constitutional and legal rights.

The courts of New York refused to reverse sixteen years of precedents on Russian property rights in that state even after President Roosevelt granted recognition to the Soviet Union in November 1933. The Attorney General ruled in 1934 that the Litvinov Assignment, one of the executive agreements between the United States and the Soviet Union that had made American recognition conditional, intended to assign Soviet claims to pre-1933 public and private Russian assets in the United States to the American government. The domestic enforcement of the Assignment, however, became a judicial struggle for the following eight years between the Justice Department and the institutions holding Russian assets and the State of New York.

After initial failures in both New York State courts and lower federal courts, the government won an important victory in the Belmont case before the Supreme Court in 1937. The Court unanimously ruled that the government had a legitimate legal chose in action to sue for the recovery of former Russian assets. What was more important than the ruling was Justice George Sutherland's majority opinion that the Roosevelt-Litvinov Agreements were

executive agreements that had the domestic legal force of a treaty, even though they had not received the advice and consent of the Senate. Sutherland's opinion dismissed the legal questions of property situs and law of the forum by placing the executive agreement at the constitutional level where it would supercede any conflicting state laws or state court rulings.

The Supreme Court temporarily reversed itself from the Belmont decision in the Guaranty Trust case of 1938 and the Moscow Fire Insurance case of 1940. In the final case arising from the Litvinov Assignment, the Supreme Court in the Pink case of 1942 decided that the government's claims to former Russian corporate assets were superior to all other claims by virtue of the constitutional status of the executive agreement. With the country entering into a total war on a global scale, the Supreme Court endorsed the Executive interpretation of the very broad diplomatic powers of the Presidency.

References for Chapter III

[1]State of Russia v. National City Bank of New York, 69 F. (2d) 44 (1934).

[2]For Ughet's assignment, see DSF 411.61 Assignments/2a and 411.61 Assignments/1-1/4. Also see Bishop, Roosevelt-Litvinov Agreements, p. 184. For Government recoveries without court actions, see DSF 411.61 Assignments/76a. For details of the Guaranty Trust Co. case, see 304 U.S. 126 (1938).

[3]Memorandum by Kelley, February 21, 1934, in FRUS: Soviet Union, 1933-1939, p. 65.

[4]Memorandum by Hull, March 26, 1934, in ibid., p. 71.

[5]"Circular No. 42," DSF 411.61 Assignments/14-1/3.

[6]Etat Russe v. Ropit (1925), 52 Clunet 391.

[7]For Soviet views on international law, see Jan F. Triska and Robert M. Slusser, The Theory, Law, and Policy of Soviet Treaties (Stanford, 1962), especially pp. 397-406, and Percy E. Corbett, Law in Diplomacy (Princeton, 1959), pp. 83-109; for Soviet views on nationalization of property, see Carr, Bolshvik Revolution, II, 58-100, 132-37, and Bukharin and Preobrazhensky, ABC of Communism, pp. 258-62, 331-36.

[8]Memorandum for the Assistant Attorney General, October 1, 1934, DSF 411.61 Assignments/19-1/2. The Belmont suit was not listed among the fifteen.

[9]For details of this case, see United States v. Bank of New York & Trust Co., 77 F. (2d) 866 (1935), and 297 U.S. 463 (1936). Also see New York Times, September 27, 1934, pp. 1,8.

[10]Transcript of Record, United States v. Bank of New York & Trust Co., pp. 1-84; 10 F. Supp. 269 (1935); New York Times, October 5, 1934, p. 10.

[11]Chase's opinion, 77 F. (2d) 866 (1935), pp. 867-70.

[12]Manton's opinion, ibid., pp. 870-80.

[13]Kelley to Moore, December 5, 1934, DSF 411.61 Assignments/23.

[14]Hull to Cummings, December 15, 1934, DSF 411.61 Assignments/25.

[15]Moore to Cummings, no date (June 1935?) DSF 411.61 Assignments/60.

[16]Frank L. Polk to President Roosevelt, March 11, 1935, DSF 411.61 Assignments/54.

[17]Morgenthau to Hull, May 4, 1935, DSF 411.61 Assignments/57.

[18]Hull to Morgenthau, May 18, 1935, DSF 411.61 Assignments/71-3/4.

[19]Bishop, The Roosevelt-Litvinov Agreements, pp 172-73.

[20]Brief for the United States, United States v. Bank of New York & Trust Co., 296 U.S. 463 (1936).

[21]Brief for respondent, ibid.

[22]United States v. Bank of New York & Trust Co.; Hughes' opinion, pp 470-81.

[23]For an historical account of the Belmont family, see Irving Katz, August Belmont (New York, 1968), Perry Belmont, An American Democrat (New York, 1940), and Eleanor Robson Belmont, The Fabric of Memory (New York, 1957).

[24]New York Times, December 12, 1924, pp 1,19; Statement, December 21, 1935, DSF 411.61 Assignments/76a.

[25]Supreme Court of the United States, Transcript of Record and Briefs, October Term, 1936. Case No. 532. United States v. Belmont, 301 U.S. 324 (1937), p 1. Hereafter cited as Transcript of Record and Briefs, Belmont Case.

[26]Ibid., pp 2-5.

[27]Ibid., Exhibit 2, pp 6-12; quotes on pp 7, 8, and 11, respectively. For the correspondence between Hardy and Robert F. Kelley of the State Department, see DSF 411.61 Assignments/81.

[28]Ibid., pp 14-16; quote on p 16.

[29]Ibid., pp 16-21. Judge Hulbert's opinion was not reported.

[30]United States v. Belmont, 85 F. (2d) 542 (1936); Judge Swan's opinion, pp 542-44; quote on p 543.

[31]Ibid., p 544.

[32]See Justice Felix Frankfurter's concurring opinion in United States v. Pink, 315 U.S. 203 (1942), p 234.

[33]77 F. (2d) 866, p 878.

[34]For the excellent account of the 1922 Supreme Court nomination battle, see David J. Danelski, A Supreme Court Justice Is Appointed (New York 1964); quotes by Taft on pp 43, 59. For the case against Manton, and Sutherland's decision, see United States v. Manton, 107 F. (2d) 834 (1938).

[35]Hull to Henderson, May 1, 1936, FRUS: Soviet Union, 1933-1939, pp 345-46.

[36]Hull to Henderson, May 5, 1936, ibid., p 346.

[37]Troyanovsky to Hull, July 21, 1936, ibid., p 347.

[38]Hull to American Embassy in Moscow, September 1, 1936, DSF 411.61 Assignments/100b.

[39]ibid. Across the bottom of the note a State Department official wrote, "Based on Mr. Sweeney's letter of August 25 and subsequent conversation with him today. He has approved this."

[40]Henderson to Hull, September 8, 1936, DSF 411.61 Assignments/102, and FRUS: Soviet Union, 1933-1939, pp 348-49.

[41]Troyanovsky to Hull, September 14, 1936, FRUS: Soviet Union, 1933-1939, p 350.

[42]Hull to Henderson, September 16, 1936, and Henderson to Hull, September 22, 1936, FRUS: Soviet Union, 1933-1939, pp 350-54.

[43]Henderson to Hull, January 9, 1937, ibid., pp 354-56; quote on p 355.

[44]Henderson to Hull, December 3, 1937, ibid., p 356.

[45]Petition for a Writ of Certiorari, Transcript of Record and Briefs, Belmont Case, pp 1-10. Writs of Certiorari granted, 299 U.S. 537 (1936).

[46]Brief for the United States, Transcript of Record and Briefs, Belmont Case, p 2.

[47]ibid., pp 6-7, 16-19.

[48]ibid., pp 7, 24-27. For the doctrine of mobilia sequenter personam, see Joseph Story, Conflict of Laws (Boston, 1841), p 310.

[49]Canada Southern Railway Co. v. Gebhard, 109 U.S. 527 (1883); quote on p 537; for Justice Harlan's single dissent, see pp 540-49.

[50]Pendleton v. Russell, 149 U.S. 640 (1892).

[51]Oetjens v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 247 U.S. 304 (1918). The brief also cited Luther v. Sagor [1921], 3 K.B. 532.

[52]Brief for the United States, pp 8, 32-37.

[53]Salimoff v. Standard Oil, 262 N.Y. 220.

[54]Brief for the United States, pp 8-10, 32-48.

[55]299 U.S. 304 (1936).

[56]Brief for the United States, pp 10-11, 48-50.

[57]Ibid., p 14.

[58]Ibid., p 51.

[59]Brief for Respondents, Transcript of Record and Briefs, Belmont Case, pp 6-7.

[60]221 U.S. 580 (1911)

[61]Brief for Respondents, pp 10-39.

[62]Ibid., p 24.

[63]See Carr, Bolshevik Revolution, II, 82-87, 99-100.

[64]Brief for Respondents, pp 39-40.

[65]Ibid., p 47.

[66]Petitioner's Reply Brief, Transcript of Record and Briefs, Belmont Case, pp 9-10.

[67]Ibid., pp 11-13, 15, 18-19.

[68]Petition and Notice of Motion to Intervene by Samson Selig for John R. Crews, Transcript of Record and Briefs, Belmont Case.

[69]300 U.S. 641.

[70]Brief of John R. Crews as Receiver, Amicus Curiae, Transcript of Record and Briefs, Belmont Case.

[71]Brief of Amicus Curiae, President and Directors of the Manhattan Co., Transcript of Record and Briefs, Belmont Case, pp 27-28.

[72]The author would like to thank the following for their attempts, although unsuccessful, to find the transcript of the oral argumentation of the Belmont case before the Supreme Court: the Office of the Marshall, Office of the Clerk, and the Library of the United States Supreme Court; Mr. Roger D. Sandack of Cadwalader, Wickersham & Taft; Nicholas L. Sullivan of the Department of Law,

State of New York, and Solicitor General Edwin N. Griswold. The author is fortunate to know an attorney, Mr. J. Paul McNamara, who heard the oral argumentation of this case on March 4, 1937.

[73] United States v. Belmont, 301 U.S. 324 (1937), pp 326-27.

[74] Ibid., p 330. For Sutherland's interpretation of dual federalism, see his opinions in Carter v. Carter Coal, 298 U.S. 238 (1936), and U.S. v Curtiss-Wright, 299 U.S. 304 (1936).

[75] Ibid., p 330 and pp 331-32.

[76] Sutherland's citations were Ware v. Hylton 3 Dallas 199 (1796), Missouri v. Holland 252 U.S. 416 (1920), Asakura v. Seattle 265 U.S. 332 (1924), John Bassett Moore, Digest of International Law, 8 vols (Washington, 1906), 210-221, and Altman & Co. v. U.S. 224 U.S. 583 (1912). For more on the constitutional law and history of treaties and executive agreements, see Green Haywood Hackworth, Digest of International Law, 8 vols (Washington, 1940-1944), V, 390-433; Elbert M. Byrd, Jr., Treaties and Executive Agreements in the United States (The Hague, 1960), pp 80-121, and passim; M. M. Whiteman, Digest of International Law, 15 vols (Washington, 1970) XIV, pp 216-240. Also see Stephen M. Millett, The Constitutionality of Executive Agreements: An Analysis of United States v. Belmont (PhD dissertation, The Ohio State University, 1972), pp 160-176, and Millett, "The Constitutional Evolution of Executive Agreements as a Tool of American Diplomacy," paper delivered at the 42nd Annual Meeting of the Ohio Academy of History, April 1974.

[77] For a further analysis of Sutherland's opinion, see Millett, Constitutionality of Executive Agreements, pp 147-50, 155-184.

[78] United States v. Belmont, p 333.

[79] Ibid., p 334.

[80] 5 Cranch 289 (1809).

[81] 208 U.S. 570 (1908)

[82]Barth v. Backus, 140 N.Y. 230 (1893).

[83]Chicago, R.I. & P. Ry. Co. v. Sturm, 174 U.S. 710 (1889), pp 716-18.

[84]Security Savings Bank v. California, 263 U.S. 282 (1923), p 386.

[85]L.R. [1933] Ch. Div. 745.

[86]American Law Institute, Restatement of the Law of Conflict of Laws (St. Paul, 1934), pp 165-66; also see pp 222-36.

[87]Ibid., pp 302-303.

[88]Stone cited Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) that the Fifth Amendment protects aliens from the government as well as American citizens. To determine New York public policy, Stone cited James & Co. v. Second Russian Ins. Co.; Matter of People (City Equitable Fire Ins. Co.), 238 N.Y. 147 (1924); Matter of Waite, 99 N.Y. 433 (1885); and the Vladikavkazski case.

[89]United States v. Belmont, pp 336-37. Stone also cited Todok v. Union State Bank, 281 U.S. 449 (1930), which ruled that a Norwegian citizen by virtue of the American-Swedish and Norwegian treaties of 1783, 1816, and 1827 did not enjoy property rights in Nebraska that were not also enjoyed by Nebraskan residents. This was a case of private international law, not diplomacy.

[90]Ibid., p 225.

[91]268 U.S. 552 (1925).

[92]First National Bank v. Maine, 284 U.S. 312 (1932). The cases cited were Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930); Baldwin v. Missouri 281 U.S. 586 (1930); and Beidler v. South Carolina Tax Commission, 282 U.S. 1 (1930).

[93]First National Bank v. Maine, p 332.

[94]301 U.S. 196 (1937).

[95]301 U.S. 234 (1937).

[96]Ibid., p 240.

[97]282 U.S. 481 (1931).

[98]Principality of Monaco v. Mississippi, 292 U.S. 313 (1934). Also see Shapleigh v. Mier, 299 U.S. 468 (1937).

[99]300 U.S. 115 (1937).

[100]Stone to Borchard, May 13, 1937, Harlan F. Stone Papers, Library of Congress. For Stone's views of conflict of laws in general, see Elliot E. Cheatham, "Stone on Conflict of Laws," 46 Columbia L.R. 719 (1946), and Paul A. Freund, "Chief Justice Stone and the Conflicts of Laws," 59 Harvard L.R. 1210 (1946).

[101]John Bassett Moore to Stone, April 30, 1931, and January 23, 1932, Stone Papers.

[102]Stone to Frankfurter, November 9, 1933, Stone Papers. On October 1, 1933, Frankfurter had informed the President that Justices Stone and Brandeis favored a new foreign policy toward Soviet Russia, Roosevelt and Frankfurter. Their Correspondence, 1928-1945. Annotated by Max Freedman (Boston, 1967), pp 159, 707.

[103]Stone to Edwin Borchard, May 13, 1937; Stone to Borchard, February 11, 1942. Also see Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law (New York, 1956), p 650.

[104]Benjamin N. Cardozo to Stone, April 21, 1937, Stone Papers.

[105]New York Times, May 4, 1937, p 14.

[106]Wall Street Journal, May 4, 1937, p 5.

[107]Chicago Tribune, May 4, 1937, p 10.

[108]Franklyn Waltman, "Politics and People," Washington Post, May 6, 1937, p 2.

[109]47 Yale L.J., 292 (1937), 51 Harvard L.R., 162 (1937); 5 University of Chicago Law Review 280 (1938); 16 Texas Law Review 253 (1938).

[110]6 George Washington Law Review 224 (1938).

[111]10 Rocky Mountain Law Review 57 (1937).

[112]23 Virginia Law Review 955 (1937).

[113]26 California Law Review 125 (1937). The Belmont case was also reviewed in 22 Minnesota Law Review 114 (1937), and 23 American Bar Association Law Review 125 (1937).

[114]Philip C. Jessup, "The Litvinov Assignment and the Belmont Case," 31 Am. J.I.L. 481 (1937).

[115]Edwin Borchard, "Confiscation: Extra-territorial and Domestic," 31 Am. J.I.L. 675 (1937). Also see Alexander N. Sacks, "Diplomatic Claims Against the Soviets (1918-1938)," 16 New York University Law Review 507 (1938) and

Edward S. Stimson, "Law Governing Title to Intangibles," 15 New York University Law Review 536 (1938).

[116]Borchard to R. Walton Moore, May 13, 1937, DSF 411.61 Assignments/155.

[117]R. Walton Moore to Joseph A. Conroy, October 19, 1936, DSF 411.61 Assignments/125.

[118]Borchard to Stone, May 6, 1937, and July 9, 1937, Stone Papers.

[119]Stone to Borchard, May 13, 1937, Stone Papers.

[120]Annual Report of the Attorney General of the United States, 1937, p 103.

[121]Annual Report of the Attorney General, 1938, pp 121-22.

[122]Memorandum of October 31, 1937, DSF 411.61, Assignments/169.

[123]DSF 411.61 Assignments/263 and 264.

[124]Samuel E. Whitaker to Robert F. Kelley, May 27, 1937, DSF 411.61 Assignments/156.

[125]Transcript of Record, Guaranty Trust Company of New York v. United States, No. 566, pp 1-184, 259.

[126]Ibid., pp 1, 257-74.

[127]United States v. Guaranty Trust Co., 91 F (2d) 898 (1937).

[128]Guaranty Trust Co. v. United States, 304 U.S. 126 (1938), pp 129-40. Also see Willard Bunce Cowles, Treaties and Constitutional Law: Property Interferences and Due Process of Law (Washington, 1945), pp 277-79.

[129]Ibid., pp 140-41

[130]3 Cranch 454 (1806).

[131]Philip C. Jessup, "The Litvinov Assignment and the Guaranty Trust Company Case," 32 Am. J.I.L. 542 (1938). Jessup was pleased with the results of this case, but not with the idea that foreign nations do not enjoy unlimited immunity in domestic courts.

[132]United States v. President and Directors of the Manhattan Co., 276 N.Y. 396 (1938); quote on p 407.

[133]Moscow Fire Ins. Co. v. Bank of New York and Trust Co., and Morro v. Moscow Fire Ins. Co., 280 N.Y. 286 (1939). For Chief Judge Lehman's opinion, see

pp 298-314; for Judge Rippey's dissent, see pp 315-25. Lehman had sat on the Court of Appeals since 1925, and he was familiar with the earlier cases concerning Russian corporate assets. He was also a very close friend of Cardozo, who died in Lehman's Albany home on July 9, 1938.

[134]United States v. Moscow Fire Ins. Co., 309 U.S. 624 (1940). In only three years, from 1937 to 1940, there were five new justices on the Court. Hugo Black replaced the retiring Van Devanter in 1937, and Solicitor General Stanley Reed replaced the retiring Sutherland in January 1938. Harvard Law Professor Felix Frankfurter took Cardozo's seat after he died on July 9, 1938. William O. Douglas took the retiring Brandeis' seat in February 1939, and Attorney General Frank Murphy replaced the deceased Butler later that year. Both Frankfurter and Douglas had strong beliefs in the power of the President in foreign relations, as will be seen in the Pink case. During the 1938, 1939, and 1940 terms, Black and Douglas agreed with each other 100% in non-unanimous opinions. C. Herman Pritchett, The Roosevelt Court, (New York, 1948), pp 243-44. Hence, it is logical that it was Black, Frankfurter, and Douglas who favored the Government's argument in the Moscow Fire Insurance case, and Hughes, McReynolds, and Roberts who opposed it. The same conclusion was reached in Michael H. Cardozo, "The Authority in Internal Law of INternational Treaties; The Pink Case," 13 Syracuse Law Review 544 (1962).

[135]Bettman v. Northern Ins. Co. of Moscow, 134 O.S. 341 (1938). Details of the case were provided by Mr. Paul McNamara of Columbus, Ohio, who was one of the plaintiff attorneys in this case.

[136]315 U.S. 203 (1942).

[137]Transcript of Record, United States v. Pink, pp 1-73; United States v. Pink, 259 App. Div. 871 (1940), 284 N.Y. 555 (1940); writ of certiorari, 313 U.S. 553 (1941); also see United States v. Pink, pp 210-15.

[138]Pritchett, Roosevelt Court, pp 12-14, 35-39, 249-51.

[139]"The U. S. Supreme Court Delivers Unanimous Verdict for Roosevelt's Foreign Policy Against Hitler," Life, 11 (October 20, 1941), pp 47-50.

[140]United States v. Pink, pp 216-26.

[141]Ibid., 226-28.

[142]Ibid., p 229.

[143]Ibid., p 234. Douglas was a close personal friend of the President, which may or may not have subtly influenced Douglas' views on Presidential powers. He

was also one of FDR's political advisors for the 1940 election. As for foreign affairs, he advocated preparedness, aid to Great Britain, and strong Presidential leadership. See Secret Diary of Harold L. Ickes, II, 601, 614; III, 53, 172-73, 342-43, 514, 614, 614-15, 617-18; Wesley McCune, The Nine Young Men (New York, 1947), pp 124-26.

[144] Ibid.

[145] Ibid., p 238.

[146] Ibid., pp 237-42. Frankfurter believed deeply that the United States had a mission to destroy Nazi tyranny. Besides his intellectual commitment to personal freedoms, his being an Austrian-born Jew may have influenced his views on Adolf Hitler. He believed in the executive prerogative in foreign affairs, and he had a great faith in FDR. As a Presidential advisor, he helped shape foreign policy by his assistance in drafting the Lend-Lease bill in January 1941. See Roosevelt and Frankfurter, pp 166, 626, 628-32, 641; Secret Diary of Harold L. Ickes, III, pp 149, 199, 486, 509; Francis Biddle, In Brief Authority (Garden City, 1962), p 129; Liva Baker, Felix Frankfurter (New York, 1969), pp 198-201, 249-53.

[147] Ibid., pp 242-56; quote on p 244.

[148] Ibid., pp 251-52.

[149] Ibid., pp 255-56. Roberts thought that Stone's dissent was unassailable, Roberts' memo to Stone on the back of the proof sheets of Stone's dissent, Stone Papers.

[150] Borchard, "Extra-territorial Confiscations," 36 Am. J.I.L. 275 (1942).

[151] Borchard to Stone, February 9, and March 14, 1942, Stone Papers, Mason, Stone, p 650.

[152] Stone to Borchard, June 14, 1942, Stone Papers; Mason, Stone, p 650.

[153] Borchard to Stone, February 9 and March 14, 1942; other documentary citations cannot be given for legal reasons.

[154] Jessup, "The Litvinov Assignment and the Pink Case," 36 Am. J.I.L. 282 (1942). Also see Jessup, A Modern Law of Nations (New York, 1948), pp 43-67. Judge Jessup has written to the author that he still maintains that the Court decided the Pink case on an incorrect understanding of international law, June 7, 1972. For a more recent evaluation of the Pink case, see Cardozo, "Authority in Internal Law of International Treaties."

CHAPTER IV
RESULTS AND CONCLUSIONS

The Roosevelt-Litvinov Accords were designed to settle certain outstanding problems of sixteen years of diplomatic non-intercourse between the United States and the Soviet Union. The White House and the Department of State believed that the agreements might well stabilize diplomatic relations with Moscow at the moment of official recognition. The agreements of November 16, 1933 proved to be a grave disappointment--they not only failed to settle old problems; they created new ones that would, from time to time, further embitter Soviet-American relations.

In particular, the Litvinov Assignment created a protracted legal problem in the United States. The State Department discovered it was one thing to negotiate the debt question with the Soviets, and the Justice Department discovered that it was quite another thing to collect the Soviet-claimed assets in the United States from the American courts. By 1942, the American diplomats had had much less success dealing with the Soviets than had government lawyers in their litigation of cases before the courts.

Collection of the Litvinov Assignment

As a result of the Supreme Court's rulings in the Belmont case of 1937 and the Pink case of 1942, the Justice Department eventually recovered $8,658,722.43 of Soviet-claimed assets in the United States.[1] The largest single recovery was some $3,500,000 from the Guaranty Trust Company in 1947 and 1948. One small part of the total recovered was $25,225.68 from the estate of August Belmont, Jr. Following the Supreme Court's ruling in the Belmont case, the Justice Department spent five years litigating this claim in New York courts. It was not until after the Pink decision that the United States District Court for the Southern District of New York ordered the claim turned over to the government.[2]

Pursuant to the policy decision made in the mid-1930's, the funds recovered from the litigation of the Litvinov Assignment were designated to satisfy claims by American citizens against the Soviet government. In 1939 Congress authorized a Commissioner of Claims to handle such matters. Sixteen years later, Congress created the Soviet Claims Fund, into which all assets recovered through the Litvinov Assignment were deposited and

from which American claims filed subsequent to the 1939 law were paid.[3]

The assets recovered by litigation proved to be the only accounts the United States has been able to recover from the Soviet Union on the pre-1933 claims against Moscow.[4] The American government has not dropped the issue and still records the debt as outstanding, even though serious negotiations with the Soviets on this matter died a long time ago. According to a staff report prepared for the Committee on Finance of the Senate in 1973, the Soviets owe the United States $192,601,000 in principal and $524,240,000 in interest (through June 30, 1972) in pre-1933 debts. The report further identifies $8,750,000 of interest paid, which was recovered from the liquidation of Russian assets in this country.[5]

Of course, the Soviet pre-1933 debt became virtually lost in the shadow of the over $10 billion American Lend-Lease aid to Moscow during World War II. The purpose of extending such enormous amounts was to help finance the Soviet war effort against Nazi Germany; the military necessities took greater priority than the soundness of the loans as recoverable investments. Indeed, the negotiation for this debt has embittered Soviet-American relations after World War II much in the same way (but in a more complex context of relations) as the old debts did after World War I.

After years of diplomatic impasse, American and Soviet representatives did sign a lend-lease debt settlement agreement in Washington on October 18, 1972. Dr. Henry Kissinger, the Special Assistant to the President, explained that the American approach to the debt problem was linked to other economic questions under negotiation: most-favored-nation status, trade credits, and maritime agreements.[6] Under the terms of the October 18, 1972, agreement, the Soviets paid an initial sum of $12 million and promised to pay a total of $722 - $759 million at 3% interest between 1972 and 2001.[7] If Kissinger's strategy of "linkage" was successful in 1972 in getting the Soviets to repay part of the lend-lease debt in return for American trade concessions, it proved to be the undoing of the same agreement three years later. The Kremlin expressly dropped the trade agreement early in 1975, ostensibly because Congress had insisted on its own policy of "linkage" between the trade question and the Soviet emigration policy for Russian Jews. With the nullification of the trade agreement there was an implicit nullification of the lend-lease settlement agreement.[8]

Law of Foreign Confiscations and Recognition

Beyond the immediate issue of the legal status of former Russian corporate assets in the United States after the recognition of the Soviet government in 1933, the Litvinov Assignment cases touched on other legal issues of great diplomatic importance. The Belmont and Pink cases produced important precedents for the judicial interpretation of the domestic effects of foreign confiscations and recognition of foreign governments.

In review, the Supreme Court ruled in the Belmont and Pink cases that no American court had jurisdiction to challenge the state acts of a foreign sovereign. If an American citizen lost property abroad due to confiscation, then his avenue of redress was through the political branches of the national government and diplomacy, not through the judiciary and litigation. If the confiscations were executed by a foreign government which was not recognized by the United States, then the acts of that government would be entitled to no legal recognition by the American courts as cases might arise in the United States. Yet, if confiscations were executed by a government that did enjoy diplomatic American recognition (and the legal effect of recognition is considered retroactive to the political creation of the recognized government), then the confiscations would have legal effect in the United States, even though such confiscations were contrary to American municipal laws. No major case decided by the Supreme Court since 1942 has significantly modified these results of the Belmont and Pink precedents.

The Supreme Court has continued to rule that recognition is a political act assigned by the Constitution to the President. As a political question, the Court has refused to exercise judicial review of recognition itself. As Justice Frankfurter observed in 1955 concerning the political changes in China, "The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."[9] There existed ample precedent for this doctrine of judicial restraint before the Litvinov Assignment cases, but the Belmont and Pink decisions further established its continued application.

The most important case in recent years raising the domestic legal effect of foreign confiscations of American property occurred in Banco Nacional di Cuba v Sabbatino (1964).[10] On August 6, 1960, the Castro regime

in Cuba nationalized several private corporations owned largely by American stockholders. The Cuban National Bank, a government-owned institution, proceeded to sell sugar that had previously been owned by the confiscated corporations. Farr & Whitlock, an American commodity brokerage house, contracted to buy sugar from the Cuban National Bank, but it refused to compensate the Cuban bank after delivery. Instead, it paid the price of the sugar to the state-appointed receiver in New York for the domestic assets of the original private corporation whose sugar had been confiscated in Cuba. The Cuban National Bank filed suit in federal court in order to recover its claim to the purchase price.

The Sabbatino case raised two important judicial questions: the legal standing of the Cuban National Bank to sue in American courts and its legal right to the sugar confiscated by the Cuban government. The first question was complicated by the fact that the bank was an arm of the Castro regime, with which the United States had officially broken off diplomatic relations. The Cuban Bank lost its case in both the District Court and the Court of Appeals.[11] The Supreme Court, by a vote of 8-1, reversed the lower court rulings by conforming to the precedents of Belmont and Pink.

Justice John M. Harlan, who wrote the majority opinion, first observed that American courts were opened to suits initiated by the Castro government. He reaffirmed the principle that American courts will not allow suits by governments not recognized by the Department of State, since the question of diplomatic recognition was a political act. Yet, he continued, the United States had recognized the Castro regime in 1959, and the breaking of diplomatic relations was likewise a political act--except it did not change the legitimacy of that government under American law. As far as the judiciary was concerned, Harlan concluded, once a foreign government received official recognition it henceforth enjoyed legal rights in the United States, regardless of the cordiality of diplomatic relations.

Harlan further observed that the sugar in question had been seized in Cuba, and therefore was subject to Cuban law. He invoked the act of state doctrine at this point: "...We decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles..."[12]

The legal conclusions of Sabbatino were that American courts are bound to give effect to foreign confiscations of American property abroad when such governments have once received American recognition. The issue of foreign confiscations, like diplomatic recognition, is essentially political by nature rather than judicial. In 1962, the General Assembly of the United Nations passed a resolution that recognized the right of a sovereign state to expropriate foreign property within its authority with adequate compensation.[13] What is in fact "adequate compension," of course, is often determined by the international politics and economics of the moment. In the final analysis, when an American citizen has a claim against a foreign government, he must seek redress through the State Department rather than through American courts: it is a diplomatic problem, not judicial.

Constitutionality of Executive Agreements

Far more important for constitutional history than the legal questions of recognition and confiscation was the Supreme Court's decision on the constitutionality of executive agreements in Belmont and Pink. The highest court for the first time had sanctioned the domestic legality of an executive agreement between the President and a foreign sovereign without the advice or consent of the Senate. While it had on previous occasions ruled on the validity of executive agreements pursuant to Congressional authorization, the Court had recognized a potentially great power for the Chief Executive to conduct his own diplomacy without the participation of Congress.[14]

There can be no question that Presidents have relied heavily upon executive agreements to conduct executive diplomacy in the last forty years. Between 1940 and 1955, there were concluded 139 treaties compared to 950 executive agreements; from 1946 to 1968, the President had entered into nearly 5,000 executive agreements; and by 1972, there were in force 947 treaties and 4,359 executive agreements.[15] Nor can it be doubted that the President has often relied upon the vague constitutional status of executive agreements in order to rationalize policies that would be controversial. It certainly has replaced the treaty in recent decades as the major forum of international contract negotiated by this country.

Much of the confusion over the constitutionality of executive agreements has been due in part to misunderstandings of the Belmont precedent. Sutherland reasoned that the authority to recognize a foreign government and to receive its ministers was delegated by the Constitution to the President

alone. If the executive enjoyed this plenary power, he concluded, then he also enjoyed the power to make diplomatic recognition conditional-- hence the status of an executive agreement as a transaction of diplomatic recognition. Although his rhetoric tended to be both sweeping and vague, Sutherland commented only upon the constitutionality of executive agreements in this limited context.

There is little doubt that under international law conditional and limited recognition exists both in principle and practice.[16] The central question rests upon whether or not the Constitution grants substantive powers to the President in the clause "he shall receive Ambassadors and other public ministers" (Article II, Section III). Professor Alexander Bickel has characterized this as "a little snippet of a phrase."[17] Constitutional scholar Raoul Berger has belittled it as an "inconsequential function" that in no way can be interpreted to authorize executive agreements.[18] As Professor Louis Henkin concluded in a much-quoted observation, "One is compelled to conclude that there are agreements which the President can make only with the consent of the Senate, but neither Justice Sutherland nor anyone else has told us which are which."[19]

Scholarly criticism and theoretical arguments notwithstanding, the Supreme Court has never reversed or qualified the Pink decision of 1942. The Litvinov Assignment cases still stand as controlling precedents on the question of Presidential power to grant recognition and enter into executive agreements pursuant to that power which are binding as domestic law upon both the national and state governments. The Supreme Court, of course, may well reach different interpretations in the future. The executive agreement is an inferred, if not implied, power granted to the President by the Constitution, and hence always subject to judicial scrutiny by the judiciary.

Future Problems

There remain few de facto governments in the world which have not yet received de jure recognition by the United States. Yet, the diplomatic and legal questions of official recognition for them seem as thorny as the problem of Soviet recognition in 1933. Indeed, the Roosevelt-Litvinov Agreements may provide an historical model for the eventual normalization of relations with these states: they are Communist, they have confiscated American property, and they have not enjoyed friendly relations (they have fought wars with the United States). These countries are the People's Republic of China, North

Korea, and North Vietnam. Added to this list are the newly victorious Communist regimes in Cambodia and South Vietnam. There is also the problem of restoring normal relations with the Castro government in Cuba.

The United States extended de facto recognition to the People's Republic of China when President Richard Nixon visited that land in 1972. Even though the two nations have exchanged consuls, cultural missions, and tourists, the United States has still not accorded official recognition. One problem is the political and legal status of the Nationalist Chinese government on Taiwan which the United States has acknowledged as the only legitimate sovereign for all of China since 1949. Another concern is an American claim of $196,861,834 principal against Peking.[20]

The United States has engaged in direct diplomatic negotiation with all of its adversaries in Asia without extending de jure recognition to any of them. Now that the Vietnam war is over with the Communist occupation of Pnom Penh and Saigon and the defeat of over twenty years of American anti-Communist policy in that region, there may well be a basic change in American policy toward the legitimacy of Communist governments in North Vietnam, South Vietnam, and Cambodia.

As for the Cuban situation, one major obstacle to the resumption of normal diplomatic relations which were cut off by the United States in 1960 is the American claim of over $1.7 billion against the Castro government.[21] No doubt the State Department will insist upon an agreement to settle that debt, whether an executive agreement or a treaty, as a condition for the normalization of relations and trade.

In final conclusion, the problems of international politics will dictate in the future, as they have in the past, the legal interpretations of foreign relations. The Roosevelt-Litvinov Agreements of 1933, and the Supreme Court interpretation of them in the Belmont case of 1937 and the Pink case of 1942, stand out as a case study in the legal and constitutional problems that arise from American foreign policy.

References for Chapter IV

[1]Harold S. Russell, Assistant Legal Advisor for European Affairs, Department of State, to the author, February 1, 1975. Bishop gives the amount as $9,114,444.66, Roosevelt-Litvinov Agreements, p 195.

[2]See Geroge P. Connally, Administrative Assistant, United States District Court, Southern District of New York, to the author, January 26, 1972. Also M. E. Meyer and Alfred Schwartz v Petrograd Metal Works, Defendant, and the United States of America, Appellant, 256 App. Div. 1077 (1939), 257 App. Div. 978 (1939).

[3]Bishop, Roosevelt-Litvinov Agreements, pp 172-73, pp 195-96.

[4]Russell to the author, February 1, 1975.

[5]"Foreign Indebtedness to the United States," staff material prepared for the Subcommittee on International Finance and Resources, Committee on Finance, United States Senate, October 29, 1973 (Washington, 1973), p 36.

[6]Department of State Bulletin, 67 (October 9, 1972), pp 390-91.

[7]Department of State Bulletin, 67 (November 20, 1972), pp 582-604.

[8]New York Times, January 19, 1975, pp 19, E5.

[9]National City Bank of New York v Republic of China, 348 U.S. 356 (1955), p 358.

[10]376 U.S. 398 (1964).

[11]193 F. Supp 375, 307 F (2d) 845.

[12]376 U.S. 398 (1964), p 428.

[13]William L. Tung, International Law in an Organizing World (New York, 1968), p 142.

[14]See Stephen M. Millett, "The Constitutional Evolution of Executive Agreements as an Instrument of American Diplomacy," paper delivered at the 42nd annual meeting of the Ohio Academy of History, Columbus, April 6, 1974.

[15]Byrd, Treaties and Executive Agreements, vi; Edward S. Corwin, The Constitution and What It Means Today, edited by Harold W. Chase and Craig R. Ducat (Princeton, 1973), p 136; John R. Stevenson, "Constitutional Aspects

of the Executive Agreement Procedure," Department of State Bulletin, 66 (June 19, 1972), p 840.

[16]Marjorie M. Whiteman, ed., Digest of International Law (Washington, 1963) 11, pp 119-33.

[17]Bickel., quoted by Raoul Berger, Executive Privilege. A Constitutional Myth (New York, 1974), p 171.

[18]Berger, Executive Privilege, p 178; also see pp 178-82.

[19]Louis Henkin, Foreign Affairs and the Constitution (New York, 1975), p 179.

[20]Russell to the author, February 1, 1975.

[21]Ibid.

UNCLASSIFIED

SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

REPORT DOCUMENTATION PAGE	READ INSTRUCTIONS BEFORE COMPLETING FORM
1. REPORT NUMBER AU-6-77-AFIT/EN (TR)	2. GOVT ACCESSION NO. —	3. RECIPIENT'S CATALOG NUMBER (9) Technical rept.
4. TITLE (and Subtitle) (6) AMERICAN DIPLOMACY BEFORE THE COURTS: JUDICIAL REVIEW OF SOVIET-AMERICAN RELATIONS, 1917-1942	5. TYPE OF REPORT & PERIOD COVERED (14) AFIT-TR-77-1
	6. PERFORMING ORG. REPORT NUMBER
7. AUTHOR(s) (10) MILLETT, STEPHEN M. Millett	8. CONTRACT OR GRANT NUMBER(s)
9. PERFORMING ORGANIZATION NAME AND ADDRESS AFIT/ENH School of Engineering, AF Institute of Technology Wright-Patterson AFB, Ohio 45433	10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS
11. CONTROLLING OFFICE NAME AND ADDRESS AFIT/EN School of Engineering, AF Institute of Technology Wright-Patterson AFB, Ohio 45433	12. REPORT DATE (11) 26 January 1977
	13. NUMBER OF PAGES 136 (12) 147 p.
14. MONITORING AGENCY NAME & ADDRESS (if different from Controlling Office)	15. SECURITY CLASS. (of this report) UNCLASSIFIED
	15a. DECLASSIFICATION/DOWNGRADING SCHEDULE

16. DISTRIBUTION STATEMENT (of this Report)

This document has been approved for public release; its distribution is unlimited.

17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)

18. SUPPLEMENTARY NOTES

Approved for public release
IAW AFR 190-17

J. F. GUESS, Capt, USAF
Director of Information
Air Force Institute of Technology (AFIT)

19. KEY WORDS (Continue on reverse side if necessary and identify by block number)

Soviet-American relations
diplomacy
judicial review
executive agreements (1917)
constitutional law
constitutional history
diplomatic history

20. ABSTRACT (Continue on reverse side if necessary and identify by block number)

Following the Bolshevik Revolution, ~~in 1917~~, the American government refused to grant de jure recognition to the Soviet regime, ~~in Russia~~. American courts likewise refused to acknowledge the legal existence of the Soviet Union in matters concerning Russian property in the United States.

In the Litvinov Assignment of 1933, when President Roosevelt granted conditional recognition to Moscow, the Soviets assigned its rights to Russian property in the U.S. to the American government. The assignment, however, proved to be

(cont'd on p 138)

DD FORM 1 JAN 73 1473 EDITION OF 1 NOV 65 IS OBSOLETE

UNCLASSIFIED

SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

012 200

tpg

Item 20 (cont'd) fr p137)

difficult for the courts to interpret and implement after sixteen years of non-recognition. In 1937, the Supreme Court ruled in United States v Belmont that the assignment had been an executive agreement with the same domestic legal effect as a treaty. Five years later, it ruled that the American government had a superior claim to the disputed Russian property to that of any private claimants because of the 1933 executive agreement.

A review of the cases concerning the legal effects of Soviet-American relations from 1917 to 1942 demonstrates the domestic impacts of foreign relations and the role of the courts as they influence the conduct of foreign relations.

138